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UNIVERSITY OF ALBERTA

NEED NOT GREED: THE LUBICON LAKE CREE BAND LAND CLAIM IN HISTORICAL PERSPECTIVE

BY

DARLENE ABREU FEREIRA

A THESIS

SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND RESEARCH IN

PARTIAL FULFILMENT OF THE REQUIREMENTS FOR

THE DEGREE OF MASTER OF ARTS

DEPARTMENT OF HISTORY

EDMONTON, ALBERTA

(SPRING, 1990)

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ABSTRACT

The Lubicon have become a household word in Canada, particularly in Alberta. Yet, after more than fifty years of negotiations with two levels of government, the band is still without a reserve and is facing a dire future. The historiography on land claims in Canada suggests that, with few exceptions, native peoples have not been treated fairly in dealings with government officials. This thesis looks at this historical trend and relates it to the Lubicon experience. It is argued that although the Lubicon have been active participants and skillful players in the on-going struggle, their story reveals a familiar pattern in the history of native-white relations, which can be characterized as an opposition of views and values, with those of the dominant society usually taking precedence.

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CHAPTER 1

INTRODUCTION

All native groups in Canada have had their land base diminished through the years, while some are still fighting for recognition of their homeland. One such group is the Lubicon Lake Cree Band of Little Buffalo, Alberta. It was almost one hundred years ago when a government party visited northern Alberta to make arrangements with the local residents for large land surrenders under Treaty No. 8. Some of these residents were never contacted and continued to live in the traditional manner. With the liquid gold rush of the 1970s, these treaty-less people were overwhelmed with the influx of developers who were equally convinced of their right to use the land. The Lubicon Lake Band fought back.

This thesis looks at the Lubicon struggle with two levels of government and developers vying for the oil-rich land which the Lubicon consider theirs. In the process, this study will attempt to provide answers to some fundamental questions relating to the Lubicon: Is there any foundation to their claim? What is there about the Lubicon case that has attracted so much public attention? What makes them a precedent?

There are two primary reasons that attract the history student to the Lubicon cause. First, the band provides a contemporary case study of attitudes and processes that have dominated native-white relations in Canada since the early days of European settlement. Has there been a significant evolution or progression in this area, or are the Lubicon experiencing a common phenomenon encountered by other native groups and chronicled by numerous historians? Secondly, there is a lack of solid academic exploration of the Lubicon's past. While the band's story often was featured on the front page of major newspapers, generally these works were without proper historical reference or analysis. By explaining the specifics of the Lubicon case within a historical framework of dominant attitudes, this thesis attempts to offer some insight into the development of government-native ralations in Canada.

The historiography on land claims has been quite consistent on one major point: native peoples in Canada have not been dealt a fair deal. The idea that Canada, unlike the United States, followed an honourable and peaceful policy in dealing with aboriginal peoples has not been completely eradicated in the public's mind, but many contemporary historians are apt to dispel the myth. Overall, most modern scholars dealing with the native aspect of Canadian history are of the opinion that Canadian authorities were neither as benevolent nor as just as traditional history texts maintain. Furthermore, recent authors argue that, contrary to previously common interpretations, native peoples were active players in activities that most effected them, from the early fur-trade economic relations, to the treaties for land cessions. In fact, in the relevant literature that surfaced in the past twenty years, it is often the government representative or official policy itself that is questioned or critically analyzed.

Of the major historians in this field, John L. Tobias stands out with his arguments that the goals of Canada's "Indian policy" has always been the "Protection, Civilization, and Assimilation" of the native population to the mainstream Euro-Canadian society. L.F.S. Upton paints a similar picture in his work, "The Origins of Canadian Indian Policy." Not only were the native ways not encouraged, they say, but through the use of legal, political, economic, and social pressures, governments were determined to eradicate the old native values. As Tobias states, the aboriginal as a cultural group was considered transitory and eventually expected to disappear outright. Nor are these merely academic points, for as it will be seen, the Lubicon Lake Band has had to deal with these assumptions through the years of their struggle with officialdom. Tobias further suggests that the Indian Act of 1876 had one long-term goal - the elimination of native peoples and the alienation of native lands. However, despite his conclusions that there were concerted efforts by authorities to destroy the native presence, Tobias rejects another assumption held by conventional historians that Canada's native peoples were passive victims. In another article entitled, "Canada's Subjugation of the Plains Cree, 1879-1885," he proposes that it was in reaction to native demands and input that the federal government proceeded to negotiate the numbered treaties with the Plains Cree. D.J. Hall disagrees with him, but only to counter that Treaty No. 1 (1871) was more significant than Treaty No. 3 (1873). Both Tobias and Hall repudiate the notion that native peoples were naive and gullible in their transactions with treaty commissioners, surrending large portions of land for little trinkets. Through a re-examination of the records left behind by those involved in the treaty-making process, Tobias shows how the Ojibwa of the North-Angle, for instance, rejected a treaty which only included a reserve and annuities. They only accepted the offer when the government gave into their demands: Goods such as farm tools, domestic animals, and other equipment were added to the agreement, and this experience set the standard for future treaties. Tobias also argues that not all native groups co-operated willingly with officials who offered unclear and unsatisfactory treaty terms. Big Bear, for example, capitulated only after his people were facing starvation as a result of government policies. This facet of the treaty-making process in the Prairies is discussed in greater detail in Chapter Two.

In "Aboriginal Rights A Century Ago," Donald B. Smith questions the ethnocentrism involved in the disputes between Canada and Ontario in the 1880s over the provincial western border. Neither party ever considered consulting the Ojibwa whose rights were being discussed in the courts. Their testimonies were not sought as evidence even by those who purpotedly were defending them. An analogous situation occurred to the Lubicon. The validity of presentations made in court proceedings by their elders was questioned and the testimony was dismissed.

Like Tobias, Rene Fumoleau writes that the native people of northern Canada also put up a struggle before signing Treaty No. 11 (1921), until the government commissioner agreed to add to the terms a guarantee that they would continue to be free to hunt, trap, and fish, in the Northwest Territories. Fumoleau explains that by this time the native population was concerned with protecting their way of life in the face of an influx of white prospectors to the oil-rich country. The Lubicon, too, are fighting for a way of life as they face similar threats to those encountered by the Treaty No. 11 people. Fumoleau also contends that most native groups were suspicious and reluctant to accept the treaty negotiations as proposed to them. Along the same line of reasoning, but with a more factual approach, Peter A. Cumming's and Neil H. Mickenberg's Native Rights in Canada criticizes the government for having pressured native peoples into large land surrenders with inadequate compensation.

Fumoleau questions not only the integrity of government policy but also suggests that there was much that was misunderstood by both sides in the treaty-making process.

Paramount to the confusion, he says, was the concept of land which was intrinsically different for the native and the white. Referring to Treaty No. 11, he concludes that perhaps the best thing the native people got out of the authorities was an official count of the northern people. He also doubts whether there has been much progress made in "honour and justice" since the Royal Proclamation of 7 October 1763. It is interesting to compare the pro-active stance of the peoples studied by Fumoleau, Tobias, and others, with the events of the modern Lubicon. It appears that the Lubicon are following the tradition of independent, assertive behaviour exemplified by many of their former neighbours.

Along with Fumoleau, Hugh A. Dempsey and James S. Frideres are among many historians who have concentrated on analyzing the complexity of native-white relations by looking into the cultural parameters. In "The Centennial of Treaty Seven and why Indians think whites are knaves," Dempsey attempts to show the extent of misunderstanding between the two cultures facing each other with totally different frames of mind. What can be detected from his observations is that the government is not necessarily blamed for the misunderstandings. This theme is exemplary of the most recent literature on native history. Many scholars have rejected the traditional interpretation of the native-victim versus government-oppressor dichotomy. The change in emphasis is due to a recognition that the old views suggested a helplessness among aboriginal peoples, which implied that they were inferior somehow, if they could not withstand the pressures of "civilization." Still, Dempsey does not ignore the reality of some of the Blackfoot in his study, as they lament their uncertain future in the face of great poverty of body and spirit. The Lubicon Band is presently going through the same soul searching in response to a rapidly declining standard of living in its community.

Whereas few contemporary scholars explicity portray authority figures as simply dishonest and cruel, many do not hesitate to chronicle the discrepancies found in land negotiations. D.N. Sprague has outlined the story of the Metis of early Manitoba by stressing that they were promised 2 1/2 million acres in 1870, but only received 600,000 by 1882. Likewise, Bob Beal and Rod McLeod show, in Prairie Fire, that the Metis and other indigenous groups had much to complain about prior to the Riel Rebellion of 1885. Rita M. Bienvenue and A.D. Fisher have explored the extent of land losses among other western Canadian indigenous groups within a "legal" framework, a complaint put forth by the Lubicon in their struggles with politicians and the courts.

Adrian Tanner and Rick J. Ponting have done extensive studies on the "colonization" thesis of native peoples, questioning whether government actions have not always betrayed implicit if not explicit racially discriminatory policies.

Recent historiography has also focused on denouncing the popular myth that native cultures are "dead" or "dying." Hugh Brody and Michael Asch haave written well-respected studies on this phenomenon, both concluding that "different" does not necessarily mean "disappearing," and that the old beliefs have perhaps served the mainstream well. This ethnocentric view is further put to question by Olive P. Dickason. She argues that not only are native societies alive and well, under the circumstances, but she even rejects yet another myth in Canadian history - that Europeans discovered a "new world." Her research shows that aboriginal people were present in the region perhaps as far back as 30,000 years B.C.

Much of the literature presently available on native history concentrates specifically on the land issue, perhaps in answer to the complex questions that have arisen recently in government-aboriginal relations, including those of the Lubicon case. Richard Price and Noel Dyck edited two volumes which deal extensively with the land issue. Their general theme is treated in a manner that traces the native identity to their traditional land. These historians argue that land for the Canadian indigenous people is tied to their cultural survival, economic development, and spiritual obligations. These are the ideas of which the Lubicon Lake Cree Band has been trying to convince the Canadian public in their 50-year-old battle.

In order to put the Lubicon battle into better historical context, a general outline of native land struggles in Canada is provided in Chapter Two. Emphasis is given to the treaty-signing period of the nineteenth century leading to Treaty No. 8, the one that missed the Lubicon. The first part of Chapter Two offers a background on some concepts of land and its usage. Because European and native views on this issue were almost always at variance, conflicts were prone to arise. The legal doctrines that have governed aboriginal land claims are best typified in Canada in the St. Catharine's Milling case. Although this ruling was rendered in the late nineteenth century, no Canadian court has yet overthrown the decision. The Lubicon claim can best be understood within this historical framework. The second part of Chapter Two looks into how the Canadian government dealt with other bands in Western Canada in the late nineteenth and early twentieth centuries, specifically in the selection of reserves. By analyzing the process, one might determine whether there was a familiar pattern throughout this period, or if the Lubicon experience is unique.

Chapters Three and Four deal specifically with the story of the Lubicon. Chapter Three outlines the band's earlier existence and dealings with government officials following the signing of Treaty No. 8. It is fair to say that up to the late 1970s the band's battle with the government was primarily of a bureaucratic nature. With the arrival of heavy-duty development operations, however, the conflict intensified with legal and political overtones. Thus, this second phase of the Lubicon struggle is discussed in Chapter Four.

The Conclusion in Chapter Five attempts to synthesize the analysis. In the on-going struggles for land, can a winner be declared? In the instance of native claims and mainstream resistance, is it a case of deeply ingrained attitudes that will take time to sort out, or is time running out?

CHAPTER II

WHOSE HOME AND NATIVE LAND?

a) Europeans set the stage and write the script:

Pope Alexander VI's bull of 1493, INTER CAETERA, followed Christopher Columbus' (1451-1506) claims of newly "discovered" lands, and recognized Portuguese and Spanish sovereignty in the Americas. The best that the bull could do for the original inhabitants in the region was to stipulate that they "be treated like tender new plants."[1] The papal bull of 1537, SUBLIMIS DEUS SIC DILEXIT, declared that peoples "discovered" by Christians "are by no means to be deprived of their liberty or the possession of their property,"[2] but Paul III's impact was minimal. While humanitarians referred to this papal position to advance their case, imperial powers were equally able to use the edicts to prove their claims to the New World. The great geographical distance between the two worlds facilitated the disregard for humanitarian considerations. The major voyages of exploration were financed and serviced by people who were prepared to ignore or dismiss that which did not serve their interests. Hence, the difficulties in communication and securing gains from the exploitation made any serious intervention problematic.

European powers also justified their operations in the New World by arguing that they had an inherent right to it. For example, Spain's first title to the New World was based on the contention that its Emperor was "Lord of the World" and therefore of all peoples of the world. The Pope, too, claimed to have "supreme jurisdiction, temporal as well as Spiritual," and justified exploitation of those who would not accept his "lordship."[3] Indeed, some church officials even maintained that heathens lost their political rights and material possessions when Christ became King of the Earth.[4] The absence of Christianity was thus frequently used to justify dispossessing the aboriginal population. Oftentimes, however, native Christian infidelity was of little consequence to European powers who were certain of their right of "discovery":

> ...and no other title was originally set up, and it was in virtue of this title alone that Columbus the Genoan first set sail. And this seems to be an adequate title because those regions which are deserted become, by the law of nations and the natural law, the property of the first occupant. Therefore, as the Spaniards were the first to discover and occupy the provinces in question, they are in lawful possession thereof, just as if they had discovered some lonely and hitherto uninhabited region.[5]

Using this "discovery" model, some commentators suggested that Europeans would have to concede their territory to a native prince should he happen to send an exploring expedition to "discover" Europe, though this was only said "facetiously."[6] European monarchies, in the meantime, "were most liberal. Since it cost them nothing to give all, they gave all, with grants usually extending to the South Sea."[7] Such generous land grants were generally accepted as valid in

Europe because the New World was perceived to be uninhabited or void of peoples of any consequence. Advocates of native claims of original ownership denounced this argument adamantly. The Spanish theologian, Francisco de Vitoria, (1486-1546), was especially vocal in his rejection of this presumption:

> ...the barbarians were true owners, both from the public and from the private standpoint. Now the rule of the law of nations is that what belongs to nobody is granted to the first occupant... And so, as the object in question was not without owner, it does not fall under the title which we are discussing. Although, then, this title, when conjoined with another, can produce some effect here (as will be said below), yet in and by itself it gives no support to a seizure of the aborigines any more than if it had been they who had discovered us.[8]

This statement is significant not only for its support of aboriginal rights, but also for the assumptions it makes on its own. Notwithstanding his rejection of European usurpation claims, Vitoria revealed a belief common in the sixteenth century that native peoples were "barbarians." He also qualified his statement by allowing for a possible attack on the aboriginal population if they refused to co-operate with European projects. In effect, Vitoria said that Spaniards were justified in causing war if they were unable to travel and reside among the natives,

> ...or if they should be prevented from sharing in those things which are common property under the law of nations or by custom - if, in short, they should be debarred from the practice of commerce - these causes might serve them as just grounds for war

> against the Indians and indeed as grounds more plausible than others.[9]

Even in the humanitarian frame of mind, therefore, concern for the aboriginal was limited or subject to European interests. Furthermore, although Vitoria's writings were widely read, his influence was primarily within academic circles. For the most part, European powers did not disagree with each other's right of discovery. Their disputes arose more from jealousy and greed rather than from concern for aboriginal rights. Thus, when François I (1494-1547) demanded to see Adam's will in order to verify the Pope's jurisdiction for distributing non-Christian lands, the French monarch was essentially protesting the papal division of the New World between Portugal and Spain only. The French king did not disagree with the stance that "whatever claim to sovereignty non-Christian Amerindians might have, it was secondary to the duty of Christian Europeans to evangelize them." François I just insisted that France not be deprived of the opportunity to do some evangelizing of its own, and hopefully build an empire in the process.[10]

From the early days of first contact, therefore, European rulers competed with each other for dominion over parts of the New World. Significantly, the conflict over territorial acquisition in the early stages of "discovery" did not involve the native people of the disputed lands. The big battles were held in European courts. In the Americas, crosses or other monuments bearing royal arms were erected by the various incoming European explorers, and these acts were considered sufficient proof that the respective European power had a right to the land in question. Whether the native people disagreed with the proposition, or were aware of the implication of the procedure, was irrelevant. By the time native peoples realized the real intentions of their foreign visitors it was often too late. As European powers established themselves more firmly in the New World, their disregard for aboriginal rights increased.[11]

Some Europeans even argued that a conquest of the aboriginal population was unnecessary because natives "had no valid legal title or any right 'of propriety and dominion.'"[12] Any antecedent rights the aborigines might have had were instantly "disqualified" by the mere fact that European powers said so.[13] The New World was regarded as terra nullius because the land was not ruled by a recognized sovereign.[14]

When European explorers penetrated the Americas, the common belief among them was that they had "discovered" a "New World." This assumption meant that whatever could be extracted from the New World was to be enjoyed by the newcomers. Europeans considered the vast territories a "New World," "undiscovered," "uncivilized," and "unpossessed," because the inhabitants were not Christians, and, therefore, not quite human:

> The exact kind of political jurisdiction and land

> tenure asserted by a monarch differed according to whether the claims were made under feudal customs or modern state law, and so in turn what grants and powers individuals received from the monarchs for the discovery and settlement of the Americas varied, but they all asserted legal jurisdiction over native persons and title over native lands.
> In examining European claims to Indian lands, one must distinguish between what the colonial powers asserted against each other's claims as opposed to what they asserted against the native title. Among themselves, they argued whether visual discovery alone sufficed to establish a valid claim to areas of the Americas or whether occupation and settlement were also necessary to secure permanent title for one nation against other European powers. The assertion of title against native claims was of quite another order: it rested upon the image of the Indian as deficient. Charters and grants to explorers and settlement agencies
> usually stipulated that they possess lands uninhabited by a Christian prince. Terra nullius was an ambiguous term, however, for it could mean lands totally vacant of people or merely religions and customs that Europeans recognized as equal to their own under the international law arising in this era.[15]

Thus, because the natives did not practise a recognizable religion, and because their living habits were not acceptable to Europeans, the whites felt justified in taking over the land:

> There is another celebrated question to which the discovery of the new world has principally given rise. It is asked whether a nation may lawfully take possession of some part of a vast country in which there are none but erratic nations, whose population is incapable of occupying the whole? We have already observed, in establishing the obligation to cultivate the earth, that these nations cannot exclusively appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate. Their unsettled habitation in those immense regions, cannot be accounted a true and legal possession, and the people of Europe, too closely pent up at home,

> finding land of which the Savages stood in no particular need and of which they made no actual and constant use, were lawfully entitled to take possession of it and settle in with Colonies. The earth belongs to mankind in general, and was designed to furnish them with subsistence... We do not, therefore, deviate from the view of nature, in confining the Indians within narrower limits....[16]

In Canada, native sovereignty was never recognized from the time of Jacques Cartier's expeditions (1534, 1535, 1541). During his second voyage, in particular, he refused to honour the local custom of trading through Chief Donnacona in Stadacona (Quebec City). Instead, Cartier broke protocol and went up the St. Lawrence as far as Hochelaga (Montreal) without prior permission from the Chief. Likewise, Samuel de Champlain did not hesitate in founding Quebec City in 1608, for the local natives had "ni foi, ni loi, ni roi,"[17] according to European standards. The Americas were obviously not empty or vacant of peoples, but by dehumanizing the inhabitants and depicting them as characterized by "'that savage inhumanity which distinguishes these People from the race of Human Kind...[and] more like a brute animal than a rational Creature,'"[18] Europeans were assuring themselves that they had a moral right to lay claim to American soil. Although few declared publicly that the native had no rights at all, the legal status of aboriginal peoples was questioned because their state was so unlike any European nation:

> No European government, in fact, asserted that the Indians had no claim at all to any of their lands. Rather they questioned just what sort of title and political jurisdiction native rulers and their peoples possessed under national and natural law,

> since they lived without the Christian religion and without the customs deemed necessary for equality in international relations at the time.[19]

To overcome this complex situation, European powers had at their disposal "occupatio bellica," the Christian doctrine that defined conquest in its broadest sense, and established European rights and jurisdiction, while extinguishing native title:

> Colonization and settlement by Whites constituted de facto and therefore de jure evidence of conquest, no matter how peacefully done. All methods presumed tacit agreement to European claims by the native peoples. Whether conquest resulted from peaceful or military means, therefore, the native lands and inhabitants came under the legal authority of the Europeans in White theory, if not always in actual control.[20]

Thus, when the French were defeated by the British during the War of Queen Anne (1701-1713), France gave Nova Scotia to Britain under the Treaty of Utrecht without informing the Micmacs, let alone receiving native consent. The Micmacs had been French allies but the Maritime natives had never considered themselves French subjects. The French, on the other hand, felt that they had the sovereign power to sign away to the English what the Micmacs believed to be Micmac land. The British, in turn, came into Acadia and announced that the Micmacs were now British subjects, even though the Micmacs refused to accept that condition and, instead, suggested that they would consider the British their trading partners. Even when the Micmacs declared war on the British, following the founding of Halifax in 1749 in Micmac country, the British refused to acknowledge the native proclamation of war. The Micmacs were not considered a foreign enemy but a group of rebellious British subjects, and they were dealt with accordingly. Eventually some land was set aside for the natives in Nova Scotia and in New Brunswick, but the colonial government made it clear that this land was granted as a favour to the natives, not as an admission of aboriginal sovereignty. Although the British bought land from native groups, these purchases were not viewed as acknowledgement of native title. The transactions were precipitated by pressures from other colonial rivals.[21]

Humanitarians decried the abuses suffered by the native population, but not all humanitarian groups questioned the status quo. Some contended that the government had a moral duty to reclaim the natives from a state of barbarism, to help the native assimilate into European civilization. It has even been suggested that the major reason for the rise of the humanitarian movement in the nineteenth century was the Europeans' sense of guilt for their treatment of aboriginal peoples. Interestingly, however, "Guilt never led to any thought that the whites might leave others alone to go their own way."[22] Nor did all humanitarians question the Europeans' right to settle in natives' lands:

> In the end, they too agreed with their opponents that the resistance to the spread of Christianity demanded force and lazy native work habits...necessitated some form of control. The point of contention therefore was the means, not the

ultimate ends.[23]

Europeans genuinely believed that they had the right and duty to spread the word of the true God among the heathens in the Americas. In return for teaching the Gospel, the newcomers helped themselves to the lands of the New World. In some respects this exchange was acceptable to some groups of aboriginal peoples because they regarded these arrangements as an extension of alliances to which they were accustomed. The agreements were also often in harmony with native views on land and its resources, for these were to be shared.[24] Problems arose when native groups were dispossessed. The immigrants were not only determined to establish a firm foundation in the New World based on agriculture, but they also believed that the European would put the land to better use. Using a value system recognized by Europeans only, white settlers were convinced that since the land was not being "properly" used, they could lawfully take what they wanted, even if this meant encroaching upon native territory. In fact, some newcomers even argued that indigenous customs were "injurious to the country"[25] because so much land was left to waste:

> ...the degree of vacancy was often a matter ~~of~~ differences in European and native land usage. What to White eyes appeared empty or underutilized according to European practices was seen as owned and fully utilized according to tribal custom and economy.[26]

There was also a problem with differing definitions of need. Some Europeans justified their takeover of the Americas by claiming that aboriginal peoples had more land than they needed, while Europeans were "too closely pent up at home."[27] As far as Europeans were concerned, native land requirements were minute. What the aboriginal needed most was moral instruction, something the European was eagerly prepared to provide. Indeed, the European need for land was perceived to be so much greater than that of the native that the nineteenth century colonial government in British Columbia allotted 160 acres to each white settler family versus 10 acres to native families.[28]

In order to live, the native people reaped the fruits of the land, but they had no concept of owning the source of those fruits. They recognized certain rights concerning land, as in the case of the right to hunt in a particular area, for instance. However, the greatest value was placed on land and its resources, not on its formal possession. If an original owner had to be named, it was the Great Spirit who created the earth and gave it to all living things, who in turn were interdependent. While many indigenous peoples accepted the private ownership of personal goods, this concept did not apply to the land around them. When Europeans spoke of title, the natives understood it in the context of their cultural definitions. For the original inhabitants, "title was the right to use the land and its riches, to range freely through the country."[29] The idea of individual land holdings was unfathomable. Furthermore, to some indigenous peoples land ownership if at all conceptualized not only could not lie with one individual but even transcended the space of time: "The land belongs not only to people presently living, but it belongs to past generations and to future generations."[30] Although they were deeply attached to the land, their connection was more with nature rather than with a deed:

> This is not the land that can be speculated, bought, sold, mortgaged, claimed by one state, surrendered or counter-claimed by another...The land from which our culture springs is like the water and the air, one and indivisible. The land is our Mother Earth.[31]

There were always cultural variations among aboriginal peoples in the Americas. Differences in customs and practices were as distinct as the diverse landscape of the New World, but the native social and spiritual relationship to the soil was widespread if not universal.[32] Similarly, different views among the Europeans must be taken into account, but it is fair to say that most white newcomers had comparable ideas on land ownership:

> ...according to classical medieval thought, the whole world was held in tenure, and all land was vested in someone, either a king or a mesne lord; dominion over the land could, therefore, be exercised only by this overlord, either mediately or immediately. As a corollary, there could be no such thing as an original acquisition of territory; title could be acquired only derivately from someone else, either by enfeoffment, conquest, or cession.[33]

It is worth comparing this European world view with that of Shawnee warrior Tecumseh (1768-1813) who, in 1809, protested the white imposition of restrictions on land, "for it never was divided, but belongs to all, for the use of each. That no part has a right to sell, even to each other, much less to strangers, those who want all, and will not do with less."[34]

This is not to say that native peoples did not have a territorial sense. They were well aware of the boundaries between the various communities around them and they took great care not to impinge on one another.[35] Considering the mobility of the hunter, it was to be expected that there would be some overlapping in surface usage. However, it is noteworthy that, as a general rule, indigenous groups did not fight one another for land.[36] Land use was integral to survival, and everyone's dependence on it meant that people and land were inseparable.[37] Their identity was intricately linked to the land.[38] Indigenous people used it but did not abuse it. In fact, they considered themselves "protectors of the land and all life in it."[39] One could not restrict land use of any living thing for that would have meant death; better to kill it outright.

Ironically, many indigenous peoples would have agreed with the European belief that natives did not own the land as beasts did not.[40] But while the aboriginal would see in this statement a declaration that no one owned the land, and that all life was equal,[41] the European understanding was that, like animals, natives had few land rights, if any. Indeed, aboriginal peoples were considered to be part of the natural environment which had to be overcome in the European "mission of progress." As for native land, Europeans held that "uncultivated land is like wild animals" and thus they were justified in "hunting to cultivate."[42] Native ideology valued the preservation of Mother Earth; Europeans focussed on its exploitation.[43]

Europeans chose not to validate the history of aboriginal occupation and ways of life. It did not serve the European interest to accommodate the indigenous communal system for that would have meant a decrease in the "available" resources. In fact, it was well understood by the newcomers that the native was an impediment to development. The wandering band took up too much valuable land. Furthermore, by the nineteenth century Europeans were convinced that native societies were destitute and even dying out.[44] In order to help them, Europeans would change them - that is, improve their lifestyle by imposing a new way to view the land. Aboriginal protest was not a hindrance, for Europeans were assured of their self-righteousness:

> We must not expect them... to evolve out of their own consciousness what is best for their salvation. We must in a great measure do the necessary thinking for them, and then in the most humane way possible induce them to accept our conclusions.[45]

This liberal concern by Americans for the native population was equally followed in Canada:

> The need for such action as I have outlined above is so imperative in the interest of the Indians that should they be unwilling to comply with the policy of the Department in connection therewith, we should, in my opinion, be provided with comprehensive legislation whereby they might be compelled to do so.[46]

b) St. Catharine's Milling Case - a precedent is set:

When Prime Minister John A. Macdonald (1815-1891) argued for the enfranchisement of all Canadian adult native men, on 4 May 1885, he pointed out that it was inconceivable to continue to withhold the federal vote from the former "lords of the soil," those who used to own "the whole of this country." In fact, Macdonald hoped that by introducing the new Franchise Bill he would be taking the first step toward alleviating a great injustice imposed on the native population of the country, who "have been great sufferers by the discovery of America, and the transfer to it of a large white population."[47] The Bill, of course, did not apply to native women, and it was eventually watered down to also exclude aboriginal men in Western Canada, who were then too closely associated with the Riel Rebellion. However, Macdonald's preoccupation with native rights did not end with the new Franchise Bill. He went on to champion their cause in what is considered today a landmark case.

The issue began with a dispute between the federal government and Ontario over the province's western boundary. Boundary negotiations began between the two levels of government in 1871 following the purchase of the Hudson's Bay Company lands by the Dominion in 1869. Ontario premier Oliver Mowat (1820-1903) contended that his province's boundary should run from the source of the Mississippi just west of the Lake of the Woods. Macdonald, on the other hand, insisted that the boundary should run just west of Lake Superior. In 1874, the then prime minister Alexander Mackenzie (1822-1892) set up a board of arbitration whose decision was favourable to Ontario's claims. When Macdonald was reelected in 1878, however, he refused to accept these findings. Instead, he gave this land to Manitoba. Although Manitoba had been a province since 1870, the federal government had retained the rights to its natural resources. With this latter arrangement, therefore, Macdonald could claim that the federal government had all rights to the land in question. He even began to grant land and timber licences in the disputed territory. Not surprisingly, Ontario protested and in 1883 Ontario and Manitoba took their case to the Judicial Committee of the Privy Council. In July 1884 the Privy Council ruled in favour of Ontario. But the battle was not over. Despite the Privy Council ruling, Macdonald continued to argue that the Dominion retained the rights to the natural resources in the disputed area. Even if the territory was awarded to Ontario, he insisted, the federal government owned the land, timber, and mineral rights because it purchased them from the Ojibwa in 1873 with the signing of Treaty No. 3. Consequently, the Dominion maintained that it was legally free to enjoy the fruits of the 55,000 square miles of surrendered land. It therefore sold a licence to the St. Catharine's Milling and Lumber Company for $4,152.52 in 1883 and the company went on to cut two million feet of timber.[48]

Inadvertently, the St. Catharine's Milling Company became involved in a dispute the conclusion of which created ramifications still felt a century later. Known as the St. Catharine's Milling Case, the final chapter in the Ontario boundary controversy began when Ontario sued the company in 1884, demanding that the company be removed from the area and that the province be compensated for damages caused by the activities of the St. Catharine's Milling Company. The case was heard before the Chancellor of Ontario. Assisted by the federal government, the St. Catharine's Milling Company argued that

> Treaty Three had transferred to the Dominion all the Indians' rights in the land... the proclamation had reserved the Indians' hunting grounds for themselves, and had recognized the Indians' perpetual right to the area's lands, timber, and minerals, until they were surrendered. According to the Royal Proclamation of 1763 the Indians could only sell their land to the federal government. Such a sale, once completed, transferred all Indian rights to the federal Crown.[49]

Oliver Mowat argued his own case for Ontario and he flatly rejected the company's arguments in reference to aboriginal rights. His response to such a claim was that "there is no Indian title at law or in equity. The claim of the Indians is simply moral and no more."[50] In essence, Mowat's position was that the native peoples had no legal title to the land. Company lawyers referred to the Royal Proclamation of 1763 as proof that the British recognized the native title, but Mowat argued that this document was only "a provisional arrangement" and that it was "expressly repealed by the Quebec Act of 1774."[51] On 10 June 1885 the Chancellor brought down his decision:

> The colonial policy of Great Britain as it regards the claims and treatment of the aboriginal populations in America, has been from the first uniform and well-defined. Indian peoples were found scattered wide-cast over the continent, having, as a characteristic, no fixed abodes, but moving as the exigencies of living demanded. As heathens and barbarians it was not thought they had any proprietary title to the soil, nor any such claim thereto as to interfere with the plantations, and the general prosecution of colonization. They were treated "justly and graciously," as Lord Bacon advised, but no legal ownership of the land was ever attributed to them.[52]

The Chancellor's conclusion was that the Treaty Three Ojibwa had no rights and therefore could not legally surrender anything to the federal government. As a result the Dominion could not claim the rights to the natural resources in the disputed territory. The St. Catharine's Milling Company license was deemed invalid. Furthermore, the Chancellor considered Treaty No. 3 to be meaningless:

> While in the nomadic state they may or may not choose to treat with the Crown for the extinction of their primitive right of occupancy. If they

> refuse the government is not hampered, but has perfect liberty to proceed with the settlement and development of the country, and so, sooner or later, to displace them.[53]

While the Chancellor was aware of the pertinent passages from the Royal Proclamation of 1763 in reference to the native peoples, he agreed with Ontario's arguments that the Proclamation was superseded by the Quebec Act of 1774, and that since that date, the Proclamation "must be regarded as obsolete."[54]

The defendants appealed this decision to the Ontario Court of Appeal, but this Court, too, decided that "the Crown's obligations to treat for Indian land title were strictly political, not legal."[55] In the appeal to the Supreme Court of Canada the defendants insisted that "In Canada, from the earliest times, it has been recognized that the title to the soil was in the Indians, and the title from them has been acquired, not by conquest, but by purchase.... The Indians had a right to occupy the land, to cut the timber and to claim the mines and minerals found on the land, and the land descended to their children...."[56] Ontario, on the other hand, continued to argue that the native peoples "have no government and no organization, and cannot be regarded as a nation capable of holding lands."[57] The Supreme Court of Canada agreed with Oliver Mowat. On 20 June 1887 Chief Justice Sir William Ritchie delivered the view of the majority in the 4-2 split decision:

> I think the crown owns the soil of all the

> unpatended lands, the Indians possessing only the right of occupancy, and the crown possessing the legal title subject to the occupancy, with the absolute exclusive right to extinguish the Indian title either by conquest or by purchase...
> I am therefore of opinion, that when the Dominion Government, in 1873 extinguished the Indian claim or title, its effect was, so far as the question now before us is concerned, simply to relieve the legal ownership of the land belonging to the Province from the burden, incumbrance, or however it may be designated, of the Indian title.[58]

Ritchie also pointed out that

> It is to be deemed a right exclusively belonging to the Government in its sovereign capacity to extinguish the Indian title and to perfect its own dominion over the soil and dispose of it according to its own good pleasure.... The crown has the right to grant the soil while yet in possession of the Indians, subject, however, to the right of occupancy....[lands] within the Province of Ontario... are necessarily, territorially, a part of Ontario, and the ungranted portion of such lands not specifically reserved for the Indians, though unsurrendered and therefore subject to the Indian title, forms part of the public domain of Ontario, and consequently public lands belonging to Ontario....[59]

Other members of the Supreme Court of Canada made individual statements, and these were equally adamant in their denial of a native land title:

> ...we have very full and clear accounts of the policy (followed by the Crown in dealings with the Indians in respect of their lands). It may be summarily stated as consisting in the recognition by the crown of usufructuary title in the Indians to all unsurrendered lands. This title... was one of which sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested....[60]

Another judge made it clear that any legal title belonged solely to the crown:

> ...[A]fter the conquest of this country all wild lands, including those held by nomadic tribes of Indians, were the property of the crown and were transferred to those who applied for them only by the crown. It was never asserted that any title to them could be given by the Indians. In 1763, after the conquest, the crown issued a proclamation by which all persons were prohibited from trading with the Indians in regard to purchase of lands, and it was declared that all such transactions should be void. The Indians were not permitted to transfer any of their rights as to the land to any individual, and no such transfers were valid unless made by the crown....I suppose nobody will assert that if a private individual entered upon any of the lands at any time the Indians could legally object, as the law does not permit them by any legal means to recover possession of the land, or recover damages for any trespass committed thereon. I mention this to show that the Indians were never regarded as having a title....[61]

One other judge contended that the British acquired full title after the conquest of the French, and that the subsequent Royal Proclamation of 1763 was in fact proof of this British title:

> ...[Not] in any grant of land whatever during the 225 years of the French domination, can be found even an allusion to, or a mention of the Indian title...Now, when by the treaty of 1763, France ceded to Great Britain all her rights of sovereignty, property and possession over Canada and its islands, lands, places and coasts,... it is unquestionable that the full title to the territory ceded became vested in the new sovereign, and that he thereafter owned it in allodium as part of the crown domain, in as full and ample a manner as the King of France had previously owned it...Now, when did the Sovereign of Great Britain ever divest himself of the ownership of these lands to vest it in the Indians? When did the title pass from the Sovereign to the Indians?... The appellants... contend that such was the effect of the royal

> proclamation...Now, as I read these clauses, they... far from supporting the appellants' case, are entirely adverse to them.... It is to crown lands, to lands owned by the crown but occupied by the Indians, that the proclamation refers. The words 'for the present' ...are equivalent to a reservation by the king of his right, thereafter or at any time, to grant these lands when he would think it proper to do so. He reserves for the present for the use of the Indians all the lands in Canada outside the limits of the Province of Quebec as then constituted. Is that, in law, granting to these Indians a full title to the soil, a title to these lands? Did the sovereign thereby divest himself of the ownership of this territory? I cannot adopt that conclusion, nor can I see anything in that proclamation that gives the Indians forever the right in law to the possession of any lands as against the crown. The occupancy under the document has been one by sufferance alone.... This proclamation of 1763 has not, consequently, ...created a legal Indian title....[62]

The Supreme Court of Canada rejected the "sentimental and philanthropic" arguments put forth by the appellants in discussing aboriginal rights, although the Court did not deny the native people any rights to compassionate consideration:

> ...The Indians must in the future, every one concedes it, be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control....[63]

The judges felt that any past "consideration" allotted to the native people by the British was due to political expediency and not because of any inherent native title:

> In 1873 the crown, in its wisdom, decided to hold these lands as a hunting ground for the Indians. In the first settlement of the country to assert sovereignty and to put that assertion into operation would have caused war, and it was necessary to treat with the Indians from time to time in order to

> facilitate settlement. They were, therefore, dealt with in such a manner that they were not asked to give up their lands without some compensation.[64]

Another member of the Supreme Court even stated that the native claim "to a title to a beneficial interest in the soil was without legal foundation. To the extent that Indian claims have been recognized, this has been 'for obvious political reasons, and motives of humanity and benevolence.'"[65] Although there were two dissenting judges in the Supreme Court ruling, it is noteworthy that the contentious point was over federal versus provincial jurisdiction, and not over aboriginal rights per se. In summary, the dissenting vote agreed that the "dominium utile" belonged to the native people, but that the "dominium directurm" was the Crown's. The disagreement, therefore, was over which "Crown" - provincial or federal - retained the "dominium." As far as the aboriginal people were concerned, all six judges were of the opinion that "property of the Indians was usufructuary only and could not be alienated, except by surrender to the crown as the ultimate owner of the soil."[66] This state of affairs apparently came about "as a necessary consequence of the right of discovery and assumption of territorial jurisdiction" by the European governments.[67] One contemporary commentator suggested that "The result of the St. Catharine's Milling and Lumber Company case is that the British, by simply setting foot on North America and planting a rag attached to a pole on the shores, acquired the title to Indian lands."[68]

The defendants took their case to the Judicial Committee of the Privy Council in London, England, and on July 1888, the highest court in the British Empire settled the Ontario western boundary dispute by denying the native peoples of Canada aboriginal rights:

> The territory in dispute has been in Indian occupation from the date of the Proclamation until 1873. During that interval of time Indian affairs have been administered successively by the Crown, by the Provincial Governments, and (since the passing of the British North America Act, 1867) by the Government of the Dominion. The policy of these administrations has been all along the same in this respect, that the Indian inhabitants have been precluded from entering into any transaction with a subject for the sale or transfer of their interest in the land, and have only been permitted to surrender their rights to the Crown by a formal contract, duly ratified in a meeting of their chiefs or head men convened for the purpose. Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never 'been ceded to or purchased' by the Crown, the entire property of the land remained with them. The inference is, however, at variance with the terms of the instrument, which show that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be 'parts of Our dominions and territories'; and it is declared to be the will and pleasure of the sovereign that, 'for the present,' they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express

> any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominion whenever that title was surrendered or otherwise extinguished.[69]

The Privy Council considered the point that only the Crown could purchase land from the aboriginal people, as stipulated in the Royal Proclamation of 1763, evidence that the Crown's interest took precedence. According to this view, the native title was subject to the ultimate ownership of the Dominion, so much so that the Crown reserved the right to terminate the native title at will.[70] Native title was a mere "personal and usufructuary right, dependent upon the good will and pleasure of the sovereign." The Judicial Committee expanded its interpretation of the native title within the framework of the Proclamation by citing another court ruling delivered in Ontario:

> Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, Attorney General of Ontario v. Mercer might have been an authority for holding that the Province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the union. But that was not the character of the Indian interest. The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of union, land vested in the Crown, subject to 'an interest other than that of the Province in the same,' within the meaning of section 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed.[71]

In the opinion of the Privy Council, aboriginal peoples were not owners of their land in fee simple which greatly limited their interest: "the Indian title was less than a full fee simple interest because it contained restrictions not found in the full fee simple interest. While the fee simple interest is fully alienable, the Indian title could be alienated only to the Crown. While the fee simple interest cannot be unilaterally revoked by the Crown, the Indian title could. While the fee simple interest is freely inheritable, the Indian title could pass only to other Indians."[72]

Historians have noted that even though the St. Catharine's Milling case is considered the most important decision regarding post-Confederation treaties, the native people affected by Treaty No. 3 were not represented in the case.[73] No one ever thought of soliciting the opinion of the former "lords of the soil." Almost one hundred years later, Canadian judges are still referring to and deferring to that ruling of the 1880s. In 1973, a judge in British Columbia stated that "Any inquiry into the nature of the Indian title must begin with St. Catharine's Milling and Lumber Co. v. The Queen."[74] In 1974, another Canadian judge paid tribute to the Privy Council verdict of the late nineteenth century: "I find the judgement at trial of Chancellor Boyd - a most learned, accurate and respected Judge - in R. v. St. Catharine's Milling & Lumber Company, to be of great assistance."[75] In 1984, the Supreme Court of Ontario, ruling on the Temagami

Land Claim, stated that it, too, valued the judgement of Chancellor Boyd.[76]

c) Reserve selection in the late nineteenth century:

When the Lieutenant-Governor of the Northwest Territories, Alexander Morris (1826-1889), visited the Qu'Appelle native people in 1874, he assured them that "We have no object but your good at heart..." in offering them Treaty No. 4, and that "Now you ought to be glad that you have a Queen who takes such an interest in you."[77] However, not all native groups were convinced of the sincerity of the treaty promises and some bands resisted the government offers of a reserve until they were certain of the implications, or until they were forced to submit. The federal policy of dealing with native peoples in the late nineteenth century was to secure land surrenders for settlement by offering the indigenous population a treaty. Ideally, from the government's point of view, the bands contacted would accept the treaty, negotiations between the two parties would commence on reserve location, a mutually acceptable site would be found, and the reserve would be established. While this scenario took place in some cases, other bands only accepted their reserve locations with reluctance and under some pressure. Still others held out until they were coerced. The government was eager to "persuade" all native groups connected with a treaty to settle on a reserve in order to facilitate white settlement. When some demanding bands refused to yield to government wishes, officials used economic pressures and other means to achieve acquiescence. The Canadian government feared that the critical bands would influence other native groups, therefore the "rebellious" bands were dealt with harshly. A well-documented example of this is the case of the numbered treaties in the prairies. The conflicts experienced by some Plains Cree in the 1870s over reserve locations shows some parallel with the modern problem facing the Lubicon; the eventual outcome of the situation in the late nineteenth century might be worth noting by those who are presently challenging the government on similar grounds.

Although the Canadian government was successful in obtaining large tracts of land with the numbered treaties in the prairie provinces in the 1870s, not all of the Plains Cree readily accepted the treaty terms offered, and they provided a troublesome example for the government in its desire to placate other native groups. In the end the government was able to break up the contingencies of resistance among the Plains Cree, but some bands were able to cause serious concern for officials. Three bands were particularly unwavering in their criticism and suspicion about the treaty terms put forth to them in 1871 and 1872, largely because their leaders foresaw what many others wished not to see. Piapot, leader of the Cree-Assiniboine, south of the Qu'Appelle River, and Big Bear(c.1825-1888) and Little Pine(c.1830-1885), leaders of two large Cree bands along the Saskatchewan River, were relentless in their demands for clear and just negotiations before they would sign any treaty. Piapot believed that

Treaty No. 4 (the Qu'Appelle Treaty) needed revisions in order that provisions such as farm equipment and tools be increased, and that the government agree to provide mills, trade shops, and instructors in farming and trades. The government agreed to "consider" these requests and Piapot took the treaty in 1875.[78]

Big Bear and Little Pine also had some grave doubts about the treaty offered them, Treaty No. 6 (Fort Pitt and Fort Carlton), especially in regard to their fears of losing their autonomy. Big Bear feared that the inducements being offered his people would lead them into a trap and he told the treaty commissioners that "We want none of the Queen's presents: when we set a fox-trap we scatter pieces of meat all round, but when the fox gets into the trap we knock him on the head; we want no bait, let your Chiefs come like men and talk to us."[79] Little Pine also indicated to authorities that "he would not take treaty because he saw the treaties as a means by which the government could 'enslave' his people."[80]

The three leaders were also reluctant to take treaty because of reports, from other bands that had taken treaty, indicating that many of the treaty terms were not being met. Located in the Cypress Hills area where some buffalo still roamed about, these three leaders enjoyed a relatively strong bargaining position, so much so that by 1878 Lieutenant-Governor David Laird (1833-1914) asked that "the government act quickly to establish reserves and honour the treaties."[81]

But these Plains Cree were accustomed to living without external interference, and they were wary of any possible restrictions on their way of life. If there were to be any restrictions implemented, they felt that it should be in regard to curtailing non-native hunting of the diminishing buffalo. When the government did not move in regulating this, Big Bear, Piapot, and Little Pine met with other native leaders, including those of the Blackfoot and the Sioux, in an attempt to establish a common front to deal with their grievances. The council worried government officials and prospective white settlers, and steps were taken to prevent the joining of forces of native people. Government objectives were greatly assisted by an unlikely source: the disappearance of the buffalo from the prairies.

By 1879 the Plains Cree could not find buffalo for their basic sustenance. In fact, many faced starvation while Canadian authorities vacillated in land surveys for reserves and in providing the necessary farm equipment. The starving conditions gave the government an upper hand in the deadlock with Big Bear and Little Pine. At this time, the new Commissioner of Indian Affairs for the North-West Territory, Edgar Dewdney (1835-1916), introduced a policy that only those native peoples who had taken treaty would receive rations. This attempt to control the Cree had some success in the face of so much hunger. Little Pine's people convinced him to take treaty in 1879, and when Big Bear still refused, many of his people left his band and joined Lucky Man and Thunderchild to form bands of their own, take treaty, and receive their share of rations.[82]

Realizing that the Plains Cree would surely be defeated if broken up, Little Pine, Piapot, and ten other bands agreed to request a reserve in Cypress Hills. Together, and if Big Bear would later join them, they would be able to maintain some autonomy and be more effective in their dealings with the government and incoming white settlers. This proposed concentration of the Cree would have created a nation encompassing almost all of today's south-western Saskatchewan. In the spring of 1880 government officials agreed to the requests for reserves in Cypress Hills, but by 1881 they became aware of the Cree intentions. Such a concentration of Cree would threaten the government's authority and ability to control the numerous bands. Dewdney convinced Ottawa that the requests for contiguous reserves in the Cypress Hills could not be granted. To ensure the dispersion of the congregated Cree, Fort Walsh and other government facilities in Cypress Hills were closed:

> Dewdney decided to take these steps fully aware that what he was doing was a violation not only of the promises made to the Cypress Hills Indians in 1880 and 1881, but also that by refusing to grant reserves on the sites the Indians had selected, he was violating the promises made to the Cree by the Treaty Commissions in 1874 and 1876, and in the written treaties. Nevertheless, Dewdney believed that to accede to the Cree requests would be to grant the Cree de facto autonomy from Canadian control, which would result in the perpetuation and heightening of the 1880-1 crisis. Rather than see

> that situation continue, Dewdney wanted to exploit the opportunity presented to him by the hunger crisis and disarmament of the Cree to bring them under the government's control, even if it meant violating the treaties.[83]

The Cree were told that only if they moved north to Qu'Appelle, Battleford, and Fort Pitt would they receive rations, and only if they took treaty. Facing starvation, and with nowhere else to go, many Cree bands left Cypress Hills and went north. However, Big Bear, Little Pine and Piapot were still unhappy with the many discrepancies in the treaties. Aware that there was much dissatisfaction among those who had taken treaty, the three leaders tried again to concentrate the Cree's forces in the north. Piapot arranged to have a meeting with other Treaty No. 4 bands, while Big Bear and Little Pine did their work in the Treaty No. 6 region. Hearing of these proposed meetings, and fearing any alliance between the groups, Dewdney threatened to cut off rations in 1883 to any band participating in Piapot's council. Big Bear, Little Pine and Lucky Man attempted to organize other bands to request reserves in the Battleford district, but Big Bear was forced to move to Fort Pitt.[84] Once again, therefore, the Cree were denied their choice of location for a reserve despite stipulations in the treaties and verbal promises that they would have a say in this matter. In fact, Dewdney even asked the government to pass legislation making it a criminal offence for a band to refuse to locate on a reserve chosen by the Commissioner.[85] In the meantime, Dewdney refused the new requests from Big Bear, Poundmaker(1826-1886), Lucky Man, and other leaders for a reserve at Buffalo Lake. Later Little Pine, Big Bear, and Lucky Man made another request for reserves next to Poundmaker's, but this, too, was rejected.[86] As tensions grew, and hunger worsened, Cree militancy spread, and Dewdney was soon assured by Ottawa that the Indian Act was being amended "To permit Dewdney to arrest any Indian who was on another band's reserve without the permission of the local Indian Department official."[87] Dewdney hoped to use this new legislation to arrest Big Bear, Little Pine, Piapot, and Little Poplar, the leaders of the growing Cree movement. With the advent of the Riel Rebellion, the government had the pretext it needed to crush the Cree spirit. The troops sent to stop the one were used to arrest the other.

Chief Lucky Man managed to obtain a reserve in 1883 as he had requested, next to Poundmaker's, but Big Bear was again denied a similar request. Big Bear took treaty in 1882 but his wishes for a particular reserve location were ignored. Officials did not want a too large concentration of native groups together in one area, and the government would not allow especially powerful chiefs to live near each other. Big Bear was given an ultimatum in September 1883; either he would quickly make up his mind to settle near Fort Pitt, well away from Lucky Man, Poundmaker, Piapot, and Little Pine, or his band would not receive any assistance.[88] Big Bear finally submitted to the pressure and for a while appeared to be a model domesticated native, having even established a freighting business between Fort Pitt and Edmonton. But Big Bear had not given up his hope for a large concentration of Cree reserves. He used his freighting trips to visit other Cree leaders to push on for larger reserves or relocations in order to do away with the distance between them. For example, Big Bear tried to convince Pakan to try to change his proposed reserve allotment to encompass the territory further east. Big Bear, in the meantime, would attempt to have his moved further west, stretching from Pakan's eastern boundary to Frog Lake, resulting in a large Cree reserve in the North Saskatchewan River district. Big Bear was also vocal in his condemnation of government officials for their neglect to honour the treaty terms, and he is purported to have told Pakan that "he would not go on a reserve until he saw all the implements, cattle and other matters that had been promised him, there first. The white men, he said, made many promises but they were very slow of fulfillment."[89] Indeed, by this time some officials were even refusing to listen to native concerns. When the second-in-command of Indian Affairs for the North-West, Hayter Reed, visited Battleford in November 1883 to make the annual treaty payments, Chiefs Lucky Man and Little Pine would not accept any money until Reed listened to their grievances and agreed to negotiate. Reed gave them an ultimatum:

> The Assistant Commissioner refused to talk with them. If they didn't take their money immediately

> and let him move on, there would be no payments at all that year, he told them. Reed's threat was undoubted illegal, a point he never let get in his way when he dealt with Indians, and he probably couldn't have carried it out. But faced with the prospect of getting nothing at all, the chiefs submitted to the bluff and took their money without having the opportunity of presenting their complaints.[90]

When Dewdney arrived at Battleford a few weeks later, he, too, refused to listen to any grievances. In fact, when some Stonies travelled from Eagle Hills to address him, Dewdney punished them for having left their reserves without prior government permission: their rations were cut off for eight days.[91] This hardline approach was heightened by another policy of providing rations only to those who worked, and Reed wished to go even further: "Reed wanted the rationing policy applied more harshly, with proportionally more provisions going to those Indians whom the agent judged to be working harder, and presumably, who were less inclined to be political agitators than others."[92] In the meantime, chiefs complained about swampy reserves and insufficient rations. The mortality rate in the reserves began to rise alarmingly. While the Indian Department could ignore the outcry from the Crees themselves, it could not dismiss the report from a doctor sent by the Department to investigate the situation in the Qu'Appelle reserves. The report bluntly stated that "Many of those who have died this winter have died from absolute starvation."[93] Reed, however, still felt that the natives were largely to blame for their impoverished condition: "No doubt the death rate is large but it must be borne in mind that the first seeds of their complaints were sown during the sojourning of the Indians in the Fort Walsh District, owing to immoral habits...."[94]

Some Cree were driven to desperate measures in order to fend off the hunger crisis. Especially during the hard winter of 1883-84, numerous incidents erupted at various reserves because of a growing discontent with the government policy of limiting the distribution of rations. One such turbulent event took place at Crooked Lakes Reserve (Qu'Appelle Valley) after the Indian Department dismissed its agent because of his generosity with rations to the natives. The new policy of "work for rations" was to be strictly enforced and no one "young and ablebodied" was to receive any rations. Facing near-starvation, a group of twenty-five young men marched into the government warehouse and demanded adequate supplies for their families. When the new agent refused to comply, they helped themselves to what they needed. The government replied by sending the army to capture the culprits and set an example. Led by Yellow Calf, the young men armed themselves and declared that they would fight, for they would rather die fighting than be starved by the government. A compromise was finally reached, with the natives agreeing to pay for what they had taken, and the government dropping the charges of armed resistance against Yellow Calf, who, officials admitted, "had acted in the interests of humanity, from first, to last."[95] Reed himself conceded that "the actual rioters were in a condition near starvation."[96]

Official handling of grievances from such chiefs as Piapot, Big Bear, and Little Pine raises some questions regarding the government's reserve policy in the late nineteenth century. Well into the twentieth century, the stated goal in establishing reserves was to facilitate native integration and "full and equal participation in Canadian society."[97] Yet, lack of consultation with the native people appears more often to have been the case. As has been shown, reserve locations were selected by commissioners, not by the indigenous peoples concerned, especially in the case of bands involved in organizing concerted political action.[98] Secondly, officials used a "divide and conquer" technique in the establishment of reserves - they were placed well apart from each other, and only given to native bands, not tribes, in order to "diminish the offensive strength of the Indian tribes, should they ever become restless."[99] Furthermore, as was mentioned earlier, movement within the reserves was also limited, especially in the 1880s. A pass system was devised in 1885 (following the Métis uprising) and natives could not leave their reserves without written consent from a government official. Dewdney explained that "strict measures must be taken to keep Indians at home and to prevent them visiting towns or wandering about the country," in order to facilitate government "control and to civilize them."[100] Those who openly opposed the government were especially guarded. "Whatever slight modifications were made to the general Indian policy or in dealing with particular bands, there would be absolutely no relaxing the rules for Big Bear's band."[101] Big Bear was never allowed to have a say on the location of his reserve.

Not only was the government's unilateral selection of reserves contrary to the promises made to the native peoples, but officials were also ignoring stipulations made in the written treaties, which, if nothing else, indicate a moral obligation on the part of the government to confer with bands on reserve locations. All the numbered treaties either make specific references to an already agreed reserve location, or state that the decision will be made in consultation with the respective bands. Treaty No. 4, for example, states: "And Her Majesty the Queen hereby agrees, through the said Commissioners, to assign reserves for said Indians, such reserves to be selected by officers of Her Majesty's Government of the Dominion of Canada appointed for that purpose, after conference with each band of the Indians...." Treaty No. 5 stipulates that "such reserves to be selected for said Indians by a Dominion Land Surveyor, or other officer named for that purpose, with the approval of the said Indians...." Treaty No. 6 states that "the Chief Superintendent of Indian Affairs shall depute and send a suitable person to determine and set apart the reserves for each band, after consulting with the Indians thereof as to the locality which may be found to be most suitable for them." Finally, Treaty No. 8 indicates that "the Superintendent General of Indian Affairs shall depute and send a suitable person to determine and set apart such reserves and lands, after consulting with the Indians concerned as to the locality which may be found suitable and open for selection."[102]

Many native peoples were not allowed to choose their reserve, while others were never granted a reserve at all when requests for one reached officials. Sometimes the government refused a treaty to bands because their land was deemed "valueless."[103] Between 1870 and 1888, for example, the Canadian government ignored the hungry inhabitants of the Athabasca-Mackenzie District. A treaty was denied them because the operation would have been too expensive for the government. In the late 1880s, however, the government proceeded to negotiate a quick settlement with the local inhabitants, perhaps because recent reports indicated possible mineral finds in the area. Soon after, officials lost interest in the region because new reports were less enthusiastic about the benefits to be gained from further exploration. The local Cree were left alone until the advent of the Gold Rush. This event renewed treaty negotiations.[104]

d) Losing land the legal way:

Not only were there discrepancies with reserve selections, but evidence also indicates that there was much confusion during treaty negotiations between Canadian officials and native leaders. Given the divergent views toward the land already discussed, it is fair to suspect that what was obvious to one party had a totally different meaning to the other. It has been even suggested that "sellers frequently had neither the right to sell (in terms of traditional authority) nor any clear concept of what they were being asked to do."[105] Some native bands have contended that when they signed treaties in the 1870s they believed they were giving whites permission to "borrow" the land and use it. It never occurred to band representatives that they were selling the land base.[106] Their misunderstanding of the transaction was perhaps due in part to the fact that the idea of selling land was previously unknown to them. The subject might also have been left unmentioned by those who clearly understood their intentions.

During the negotiations of Treaty No. 8 at Fort Chipewyan (1899), treaty Commissioner James McKenna reported that the natives kept the government party "on tenterhooks for two hours" and that he "never felt so relieved as when the rain of questions ended, and, satisfied by our answers, they acquiesced in the cession."[107] One can wonder at the reassurances provided to the native inquiries, for "It would seem that few people were concerned with the land ownership question, the real reason for the coming of the visitors."[108] Native leaders believed that they were acquiring guarantees to hunt, fish, and trap as they had done since time immemorial, without white interference or government restrictions.[109] Others understood the treaty to be a peace agreement between equal partners, and "to ensure that there would be no conflict between Indians and incoming whites... no mention of land was made."[110]

Government intentions of acquiring land through a treaty were often not known to the aboriginal people. There was even difficulty at times with various interpretations of the actual ceremonies. For instance, in 1876 Commissioner Thomas Howard visited the Grand Rapids Band (Treaty No. 5) to make the first annuity payment. Upon Howard's arrival, the chief was astonished to hear that a treaty had been made the previous year. In fact, the chief explained that he had only talked then and that now he was prepared to discuss a treaty agreement with the white government, at which time the commissioner presented a copy of the written document already signed.[111]

The potential for cross-cultural misunderstandings was obviously great considering the different world views that met through an interpreter, often of questionable abilities or objectivity.[112] Commissioner McKenna had reason to feel uneasy during treaty negotiations at Fort Chipewyan. Not only was the land question and the proposed sub-surface exploration left unmentioned, but even the obvious native understanding of what was guaranteed by the treaty was false. The Chipewyans were especially concerned about their hunting rights upon which they depended for their livelihood. The commissioner assured them that the treaty would not restrict these rights,[113] knowing full well that Parliament was at that time considering legislating a prohibition against killing buffalo in that area. His explanation for the omission in the negotiating discussions was that "Our mission would likely have been a failure if we had opened up the question."[114]

It is also possible that the land question was not fully explained to the Cree, Beaver, and Slavey who signed Treaty No. 8 because the Commissioners felt it was unnecessary. As far as the government was concerned, it already owned the land. The treaty served to facilitate development in the region. It provided the means for the peaceful "removal of any obstructions"[115] in the way of civilization. Furthermore, even if officials had attempted to discuss the land issue, it is doubtful that the native peoples would have grasped the idea put forward, for the European view was truly foreign to them:

> ...How could anybody put in the Athapaskan language through a Métis interpreter to monolingual Athapaskan hearers the concept of relinquishing ownership of land, I don't know, of people who have never conceived of a bounded property which can be transferred from one group to another. I don't know how they would be able to comprehend the import translated from English into a language which does

> not have those concepts...So this is an anthropological opinion and it has continued to puzzle me how any of them could possibly have understood this. I don't think they could have.[116]

Vital Grandin (1829-1902), the Catholic Bishop of St. Albert, made a similar observation regarding the signing of Treaty No. 7 (1877). Fifteen years after this historic event, he estimated that the Blackfeet

> understood the necessity of accepting the Treaty, but even with all the explanations made to them, before as well as during the Treaty negotiations, I doubt if they ever understood the consequences of their signing. I even doubt if they understand them today.[117]

Not only did many aboriginal peoples not have a concept of land ownership comparable to the European, but some natives were unaware even of the significance or value of the money distributed among them.[118]

Government officials might be excused for not explaining clearly every detail of their proposals. It is possible that they believed that the questions of land ownership and money transactions were understood by everyone and obvious during the discussions. With Treaty No. 8, for example, "it is very probable that the two parties neither understood each other nor agreed on what the treaty meant."[119] However, questions remain regarding other irregularities that went beyond cultural differences. There is evidence that when certain native groups sought more explanations and more time to consider the offer before them, officials attempted to put pressure and rush the process.[120] According to one eyewitness to the signing of Treaty No. 8, "The commissioners were very persistent" and talked the natives into signing the treaty, but "There were many things promised we did not see."[121] Other participants in the Treaty No. 8 negotiations indicated that some verbal commitments made at the time were not included in the written text. A missionary present at the signing ceremony left his recollections:

> When Bishop Grouard sent me to Wabasca (at the request of Mr. Laird) to prepare the people and calm them, (it was then said that they were more or less in a state of revolt) I carried with me the Government promises, and I was very surprised when later on I was shown the document supposedly signed by the Indian Chiefs at Grouard (a village at the west end of Lesser Slave Lake) and thereabouts. So many important things are missing....[122]

Alexander Morris, too, conceded in his records that "When treaties one and two were made, certain verbal promises were unfortunately made to the Indians, which were not included in the written text of the treaties, nor recognized or referred to, when these treaties were ratified by the Privy Council."[123] Maybe this was why, despite his assurances to the native people that the Queen "is always just and true. What she promises never changes,"[124] the Lieutenant-Governor later declared that "Often when I thought of the future of the Indian my heart was sad within me."[125]

Perhaps what saddened Lt-Gov. Morris was the sense that the native people might have lost a great deal in the treaty making process.[126] Even if he did not appreciate the possible impact of the treaties on the native population, he was informed of some of the injustices by other observers. Father Albert Lacombe (1827-1916), for example, wrote Morris in 1875 to tell him about the demoralized natives in Western Canada. The priest's report was frank in its depiction of the dishonesty of government employees and their attempts to fool the native people and lie to them, "either through the Treaties or in other Indian agency matters." Nor was Father Lacombe reluctant to criticize the very tool which, in his opinion, was to blame for the deterioration of the native traditional way of life:

> As for myself, I think that too little is offered to the Indians in return for the ownership of their lands. By signing treaties with them we deprive them of their lands, of their hunting, of their rivers, of their lakes and leave them only reserves which very soon will be surrounded by White settlements and consequently be devoid of game.[127]

Although the Royal Proclamation of 1763 and the Indian Act of 1876 were supposedly intended to "protect" the native population in Canada, these official documents were not great impediments to the goals of white settlers. When necessary, new legislation was enacted to alter the previous policy and to serve current needs as perceived by the dominant society. Nor was this a break from any established procedure: "The relationship between Indians, Indian lands, and development was clear from the beginning. **Development always took precedence.** Indians were never allowed to stand in the way."[128] Natives were told to sign treaties if they wanted - either way they would lose their land for they could not stop the influx of immigration. The treaties, they were told, would give them certain benefits, but "the issue of control over the land was not negotiable... Policy was pragmatic, not theoretical. While the government was willing to extinguish Indian title by treaty, it avoided clear definitions of aboriginal title."[129]

This pragmatic approach facilitated the implementation of new regulations as the need arose. In 1918, for instance, Minister of Indian Affairs Arthur Meighen (1874-1960) announced a new policy which enabled the government to lease native land with or without the band's consent. Proponents of this act justified it by pointing out that some bands refused to surrender, sell, or lease their reserve lands "...through some delusion, misapprehension or hostility...."[130] Left with the crumbs of their original land base, more and more bands succumbed to an inevitable dependent status:

> Historically, we can see how the Indian land question was closely intertwined with Indian economic under-development. Indians were asserted to be detrimental to the growth of settlement. Therefore, economic sanctions were used to coerce Indian land surrenders in order to further non-Indian settlement....
>
> It should be recognized by now that the under-development the Indians have suffered has not been a consequence of their ignorance or backwardness. To the contrary, underdevelopment of Indian reserves has been both a cause and a consequence of federal land policy and federal Indian policy. Indirectly, non-Indian settlement has been a direct consequence of government suppression made necessary by the belief that Indians and their land stood in the path of settlement.[131]

Other aboriginal land losses occurred during World War

I when the Canadian government rewarded returning soldiers with land grants. The Soldier Settlement Acts of 1917 and 1919 provided homesteads to those who fought for democracy abroad. As a result, the government forced the surrender of approximately 70,000 acres of reserve land in the prairies for this purpose.[132] These homesteads were not made available to native veterans, who were sent back to their reserves. Once again the argument put forward was that the natives did not need so much land,[133] although they were allowed to take back that which the returning soldiers considered useless.

At the same time as the Soldier Settlement Acts, reserve lands were further broken up for use in the Greater Production Campaign. Aimed at maximizing agricultural production for the war effort, the campaign called for amendments to the Indian Act in order that "idle" reserve land be put to better use. Meighen claimed that only "backward" bands objected to the taking of their reserve lands.[134] In addition, it was argued that natives had "far in excess" of what they needed, and that the expropriation of reserve land was necessary due to the "disinclination to cultivate it" properly by the inhabitants.[135]

As has been shown, even the establishment of reservations did not protect a band from enduring further land losses. Nor did a reserve provide protection against outside forces and influences. As Father Lacombe mentioned in the late nineteenth century, a reserve surrounded by settlement or development will soon suffer the consequences. The natural habitat, for one, will quickly disappear. More and more bands presently involved in land claims are noting this reality and are aiming to meet the challenge. The Lubicon Cree Band, for example, has resisted any reserve offer that did not include a wildlife management program to minimize the impact on the reserve of activity around their homeland. Furthermore, although the Lubicon have not been given a reserve, and, accordingly, did not experience land losses under the Soldier Settlement Acts and the Greater Production Campaign discussed above, the arguments used to introduce new legislation during the First World War, facilitating the encroachment of native land, are similar to arguments used more recently to stop the Lubicon. As will be seen in Chapter III, the provincial government changed a pertinent piece of legislation when the Lubicons were making some headway in their struggle. The new law succeeded in weakening the Lubicon resistance, much as Meighen's efforts in 1917 circumvented the outcries from critics. With both cases, doubts arise as to whether native peoples can rely or count on even existing law to guarantee their rights.

Aboriginal peoples have claimed that the Royal Proclamation of 1763 is the Canadian native charter[136] and their Bill of Rights,[137] while "the treaties represent an Indian Magna Carta."[138] However, Canadian courts have not been as generous with their interpretation of these documents. A

1979 judgement concluded that Treaty No. 8 was not an agreement between two sovereign states,[139] though the court did not view it as a mere simple contract either. From the native point of view, there has always been a discrepancy between the literal wording of the treaties and the true agreements made by their forebearers - that is, the legal meaning versus the spirit of the treaties. The complexity of the issues grow with the passage of time, and so do the number of native claims. As of 1985, there were approximately 220 outstanding claims in Canada, most of them dealing with the native land question.[140] There appears to be no end in sight for the many native struggles, but to stop struggling would mean the end for many. For this reason, the Lubicon Lake Cree Band has been fighting for more than fifty years.

ENDNOTES

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[2] As cited in Olive Patricia Dickason, Louisbourg and the Indians: A Study in Imperial Race Relations, 1713-1760 (Ottawa: Parks Canada, 1976), 19.

[3] Maureen Davies, "Aspects of Aboriginal Rights in International Law," in Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada, edited by Bradford W. Morse (Ottawa: Carleton University Press, 1985), 21.

[4] Dickason, The Myth of the Savage (Edmonton: University of Alberta Press, 1985), 127.

[5] As cited in Davies, "Aspects of Aboriginal Rights," 21.

[6] Geoffrey S. Lester, Aboriginal Land Rights: Some Notes on the Historiography of English Claims in North America (Ottawa: Canadian Arctic Resources Committee, 1988), 40.

[7] Ibid.

[8] As cited in Davies, "Aspects of Aboriginal Rights," 21-22.

[9] Ibid.

[10] Dickason, Myth of the Savage, 129.

[11] Ibid., 134.

[12] Lester, Aboriginal Land Rights, 15.

[13] Ibid., 23.

[14] Ibid., 33.

[15] Robert Berkhofer, The White Man's Indian: Images of the American Indian from Columbus to the Present (New York: Alfred A. Knopf, 1978), 120.

[16] Emer de Vattel (1714-1767), as cited in R.J. Surtees, "The Development of an Indian Reserve Policy in Canada," Ontario History 60 (1968), 89.

[17] As cited in Cornelius Jaenen, "Conceptual Frameworks

for French Views of America and Amerindians," French Colonial Studies, No. 2 (1978), 13.

[18] As cited in Robin Fisher, Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890 (Vancouver: University of British Columbia Press, 1977), 76.

[19] Berkhofer, White Man's Indian, 121.

[20] Ibid., 122.

[21] Lester, Aboriginal Land Rights, 39; See also, Dickason, "Amerindians Between French and English in Nova Scotia, 1713-1763," American Indian Culture and Research Journal 10, No.4 (1986), 31-56.

[22] Upton, "The Origins of Canadian Indian Policy," 54.

[23] Berkhofer, White Man's Indian, 124.

[24] Dickason, Myth of the Savage, 134.

[25] Canada, Historical Development of the Indian Act, 2nd ed. (Ottawa: DIAND, 1978), 16.

[26] Berkhofer, White Man's Indian, 120.

[27] Emer de Vattel, as cited in Surtees, "Indian Reserve Policy," 89.

[28] Daniel Raunet, Without Surrender Without Consent: A History of the Nishga Land Claims (Vancouver/Toronto: Douglas & McIntyre, 1984) 76.

[29] Fumoleau, As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939 (Toronto: McClelland and Stewart, 1973), 18, 307.

[30] As cited in David W. Elliott, "Aboriginal Title," in Aboriginal Peoples and the Law (Note 3), 50.

[31] George Manuel and Michael Posluns, The Fourth World: An Indian Reality (Don Mills: Collier-Macmillan, 1974), 6. See also Daniel, "Spirit and Terms of Treaty Eight," 55.

[32] Manuel and Posluns, Fourth World, 7.

[33] Lester, Aboriginal Land Rights, 27.

[34] As cited in Annette Rosenstiel, Red and White: Indian Views of the White Man, 1492-1982 (New York: Universe Books, 1983), 114.

[35] Hugh Brody, Maps and Dreams: Indians and the British Columbia Frontier (Vancouver/Toronto: Douglas & McIntyre, 1981), 176.

[36] Upton, Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867 (Vancouver: University of British Columbia Press, 1979), 9; E. Palmer Patterson, The Canadian Indian: A History Since 1500 (Don Mills: Collier-Macmillan, 1972), 65.

[37] Brody, Maps and Dreams, 12.

[38] Derek G. Smith, ed., Canadian Indians and the Law: Selected Documents, 1663-1972 (Toronto: McClelland and Stewart, 1975), xviii.

[39] Oren Lyons, "Spirituality, Equality, and Natual Law," in Pathways to Self-Determination: Canadian Indians and the Canadian State, edited by Leroy Little Bear et al. (Toronto: University of Toronto Press, 1984), 11.

[40] Raunet, Without Surrender, 92. Indeed, an editorial in a British Columbia newspaper stipulated in 1863 that "they could no more talk of Indian right to the land 'than we can prate of the natural right of a he-panther or a she-bear to the soil.'" Robin Fisher, "Joseph Trutch and Indian Land Policy," BC Studies, no. 12 (Winter 1971-72), 19.

[41] Lyons, "Spirituality, Equality," 6.

[42] Patterson, The Canadian Indian, 87.

[43] Lyons, "Spirituality, Equality," 3-4.

[44] Brody, Maps and Dreams, 147.

[45] As cited in J.E. Chamberlin, The Harrowing of Eden: White Attitudes Toward Native Americans (New York: The Seabury Press, 1975), 163.

[46] Deputy Superintendent General of Indian Affairs, Duncan Campbell Scott (1862-1947), to Minister of the Interior and Superintendent General of Indian Affairs, Arthur Meighen (1874-1960), correspondence dated 3 April 1919, as cited in John Leonard Taylor, Canadian Indian Policy During the Inter-war Years, 1918-1939 (Ottawa: DIAND, 1984), 24.

[47] As cited in Smith, "Aboriginal Rights A Century Ago," 5.

[48] Ibid., 7.

[49] Ibid., 11.
[50] Ibid., 10-11.

[51] Ibid., 11.

[52] Ibid., 12.

[53] Ibid.

[54] Ibid.

[55] Ibid.

[56] Ibid.

[57] Ibid., 14.

[58] As cited in Bruce H. Wildsmith, "Pre-Confederation Treaties," in Aboriginal Peoples and the Law (Note 3), 128-29.

[59] As cited in L.C. Green, "Claims to Territory in Colonial America," chapter I, The Law of Nations and the New World, L.C. Green and Olive P. Dickason (Edmonton: University of Alberta Press, 1989), 114.

[60] Ibid., 115.

[61] Ibid., 117.

[62] Ibid., 120.

[63] As cited in Wildsmith, "Pre-Confederation Treaties," 129.

[65] Ibid.

[66] Ibid., 133-34.

[67] Ibid., 132.

[68] As cited in Smith, "Aboriginal Rights A Century Ago," 15.

[69] As cited in Elliott, "Aboriginal Title," 57-58.

[70] Ibid., 97.

[71] Ibid., 97-98.

[72] Ibid., 98.

[73] Norman K. Zlotkin, "Post-Confederation Treaties," in Aboriginal Peoples and the Law (Note 3), 304. See also Smith, "Aboriginal Rights A Century Ago," 131.

[74] As cited in Elliott, "Aboriginal Title," 109.

[75] As cited in Smith, "Aboriginal Rights A Century Ago," 15.

[76] Ibid.

[77] Alexander Morris, The Treaties of Canada with the Indians of Manitoba and the North-West Territories (Toronto: Belfords, Clarke & Co., 1880; reprint, Toronto: Coles Publications, 1971), 97-98.

[78] Tobias, "Canada's Subjugation," 524.

[79] Morris, Treaties of Canada, 174. Not surprisingly, Morris considered the Saulteaux "shrewd men," but he also considered Big Bear a "troublesome fellow." In Morris' estimation, "These Saulteaux are the mischief-makers through this western country." Ibid.

[80] As cited in Tobias, "Canada's Subjugation," 525.

[81] Ibid.

[82] Ibid., 527.

[83] Ibid., 530.

[84] Ibid., 532.

[85] Ibid., 535.

[86] Ibid., 537. See also Beal and Macleod, Prairie Fire, 77.

[87] Tobias, "Canada's Subjugation," 537.

[88] Beal and Macleod, Prairie Fire, 78.

[89] Ibid., 79.

[90] Ibid.

[91] Ibid., 86.

[92] Ibid., 100.

[93] Ibid., 88.

[94] Ibid., 89.

[95] As cited in Isabel Andrews, "Indian Protest Against Starvation: The Yellow Calf Incident of 1884," Saskatchewan History 28, no. 2, (Spring 1975): 46. See also Beal and Macleod, Prairie Fire, 84.

[96] Beal and Macleod, Prairie Fire, 84.

[97] Joanne Hoople, And What About Canada's Native Peoples? (Ottawa: CASNP, 1976), 6.

[98] See also E. Brian Titley, A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada (Vancouver: University of British Columbia Press, 1986), 65.

[99] Morris, Treaties of Canada, 288.

[100] As cited in Delia Opekokew, ed., The First Nations: Indian Government and the Canadian Confederation (Saskatoon: Federation of Saskatchewan Indians, 1980), 31

[101] Beal and Macleod, Prairie Fire, 100.

[102] Canada, Treaty No. 4 Between Her Majesty the Queen and the Cree and Saulteaux Tribes of Indians at Qu'Appelle and Fort Ellice (Ottawa: Queen's Printer, 1966), 6; Treaty No. 5 Between Her Majesty the Queen and the Saulteaux and Swampy Cree Tribes of Indians at Beren's River and Norway House With Adhesions (Ottawa: Queen's Printer, 1969), 13; Treaty No. 6 Between Her Majesty the Queen and the Plains and Wood Cree Indians and Other Tribes of Indians at Fort Carlton, Fort Pitt and Battle River with Adhesions (Ottawa: Queen's Printer, 1964), 3; Treaty No. 8 Made June 21, 1889 and Adhesions, Reports, etc. (Ottawa: Queen's Printer, 1966), 13.

[103] Fumoleau, This Land Shall Last, 31.

[104] Ibid., 42-43.

[105] Patterson, The Canadian Indian, 15.

[106] Canada, Historical Development of Indian Act, 81.

[107] As cited in Charles Mair, Through the Mackenzie Basin: A Narrative of the Athabasca and Peace River Treaty Expedition of 1899 (Toronto: William Briggs, 1908), 65-66.

[108] Fumoleau, This Land Shall Last, 78-79.

[109] Richard Daniel, "The Spirit and Terms of Treaty Eight," in Spirit of Alberta Treaties,(see note 24, Ch. 1), 89.

[110] Ibid.

[111] Morris, Treaties of Canada, 159-160.

[112] Ibid., 144. For example, speaking of the Hon. James McKay, a halfbreed who assisted in the 1875 negotiations for the Winnipeg Treaty (No. 5), Morris stated that "Thoroughly understanding the Indian character, he possessed a large influence over the Indian tribes, which he always used for the benefit and the advantage of the Government."

[113] Fumoleau, This Land Shall Last, 77-78.

[114] As cited in Daniel, "Spirit and Terms of Treaty Eight," 89.

[115] Brody, Maps and Dreams, 63

[116] Anthropologist June Helm made this observation before Justice W.G. Morrow in 1973, Paulette et al, Supreme Court of Northwest Territories. As cited in Daniel, "Spirit and Terms of Treaty Eight," 95.

[117] Fumoleau, This Land Shall Last, 26.

[118] Lynn Hickey et al., "T.A.R.R. Interview with Elders Program," in Spirit of Alberta Treaties, 149. See also Fumoleau, This Land Shall Last, 91.

[119] Fumoleau, This Land Shall Last, 19.

[120] Daniel, "Spirit and Terms of Treaty Eight," 77-79, 92.

[121] As cited in Hickey, "T.A.R.R. Interview," 150-52.

[122] These sentiments were expressed by Constant Falher, IMO, in 13 August 1937, as cited in Fulomeau, This Land Shall Last, 67. In addition, see p. 97 for a discussion on some discrepancies in the signatures in the original text. Also see Cumming and Mickenberg, Native Rights in Canada, 126-128.

[123] Morris, Treaties of Canada, 126.

[124] Ibid. 94.

[125] Ibid. 204.

[126] There were times when Morris showed ambivalence toward

what he was offering the native people, while at other times he prided himself of his accomplishments on behalf of the Canadian government. Frideres, Native People in Canada, 68-69. See also Fumoleau, "A History of Exploitation," 17-20.

[127] As cited in Fumoleau, This Land Shall Last, 26.

[128] Taylor, Canadian Indian Policy, 202. Emphasis added.

[129] Ibid., 202-203. See Also Morris, Treaties of Canada, 34-35, 204-05.

[130] As cited in A.D. Fisher, "Indian Land Policy," 93.

[131] Ibid., 94-95.

[132] Taylor, Canadian Indian Policy, 31. See also A.D. Fisher, "Indian Land Policy," 88-94.

[133] Taylor, Canadian Indian Policy, 29.

[134] Ibid., 18.

[135] Canada, Historical Development of Indian Act, 112-13. By 1939 DIAND reported that there was a "realization that lands held as reserves for the Indians of Canada are not more than sufficient for their ultimate needs." The volume of sales of surrendered native land decresed for this reason and due to a falling demand for farmland. Canada, Annual Report of the Department of Indian Affairs (Ottawa: Queen's Printer, 1940), 227.

[136] Wildsmith, "Pre-Confederation Treaties," 134.

[137] Ibid., 154.

[138] Ibid., 144.

[139] Richard Bartlett, "Reserve Lands," in Aboriginal Peoples and the Law (note 3), 471. The case, in Town of Hay River v. The Queen and Chief Daniel Sonfrere (1979), involved a challenge to the authority under which a reserve could be set up. The Town of Hay River, Alberta, was concerned with the reserve boundaries which extended beyond its municipal limits.

[140] Bradford W. Morse, "The Resolution of Land Claims," in Aboriginal Peoples and the Law (note 3), 659.

CHAPTER III

The Lubicon Lake Cree Band to 1980

a) A forgotten people:

On 22 May 1899, the Honourable David Laird, Lieutenant-Governor of the Northwest Territories, and a group of his staff, boarded a train in Winnipeg heading for Edmonton. From there, they loaded thirteen wagons with provisions and travelled north toward Lesser Slave Lake, the pre-determined location for their first meeting. Upon their arrival, on 19 June, preparations were made for the eventful occasion, and on the following day Laird addressed the assembled crowd:

> Red Brothers! We have come here to-day, sent by the Great Mother to treat with you, and this is the paper she has given us, and is her commission to us signed with her Seal, to show we have authority to treat with you... I have to say, on behalf of the Queen and the Government of Canada, that we have come to make you an offer... As white people are coming into your country, we have thought it well to tell you what is required of you....We understand stories have been told you, that if you made a treaty with us you would become servants and slaves; but we wish you to understand that such is not the case, but that you will be just as free after signing a treaty as you are now. The treaty is a free offer; take it or not, just as you please. If you refuse it there is no harm done; we will not be bad friends on that account. One thing Indians must understand, that if they do not make a treaty they must obey the laws of the land - that will be just the same whether you make a treaty or not; the laws must be obeyed... The Queen owns the country, but is willing to acknowledge the Indians' claims, and offers them terms as an offset to all of them....[1]

Thus began the ceremonies which led to the signing of Treaty No. 8, Chief Keenooshayo and Chief Moostoos agreeing on behalf of the Crees. This first step was considered the most important by the treaty party and script commissioners, for the remaining work was seen as merely obtaining "adhesions" to the treaty from other native groups in the territory.[2] The treaty commission split into small groups and contacted some Beavers at Fort Dunvegan, the Crees and Beavers at Fort Vermilion and Little Red River, the Crees and Chipewyans at Fort Chipewyan, a group at Great Slave Lake, some Chipewyans at Fond du Lac, other Chipewyans and Crees at Fort McMurray, and some Crees at Wahpooskow. By the end of July, the commissioners had completed their task and headed home. They were aware that not all peoples were reached, and, accordingly, a second commission was sent the following summer to meet with those originally missed. This second trip managed to secure the adhesion of another 1,200 natives, bringing the total of adhered "souls" to 3,566 by 1906.[3] Despite these efforts by the Canadian government, however, certain native groups living in outlying areas were never visited by treaty officials. Commissioner James Macrae noted at the time that "There yet remains a number of persons... who have not accepted treaty... because they live at points distant from those visited."[4] He estimated that the number missed was aproximately 500 people, but studies done by federal genealogists now indicate that the treaty negotiations might have left out many groups, possibly numbering several thousand natives.[5] Among these were the Lubicon Lake Cree Band.

Ninety years after Laird's initial visit to the Peace region, the Lubicon Lake Band has still not "adhered" to Treaty No. 8. On separate occasions, the band sent some Lubicons to contact the Department of Indian Affairs and Northern Development (DIAND), but these early efforts were unsuccessful. Upon their arrival at Whitefish, for example, the Indian Agent would put their names on the Whitefish Band list, give them five dollars each, and send them off. The agent did not recognize the Lubicon as a separate and distinct group. In the early part of the twentieth century, the Lubicon lived relatively unmolested by outsiders. With the advent of the Great Depression, however, rumours were heard that white people would come in hordes to live in the bush. Fearing that they might lose their land, the Lubicon sent a petition to the federal government in 1933 requesting a land settlement. Their petition, dated 26 August 1933, and signed with Xs by the fourteen household leaders in the community, pleaded with the government that "We are neglected."[6] Finally, in 1939, Ottawa responded by sending Napoleon L'Heureux, a regional Indian agent, and C.P. Schmidt, the federal inspector of Indian agencies in Alberta, to meet with the Lubicon. The government officials recognized the community as a separate band and promised to establish a reserve. L'Heureux reported to Ottawa that "It was well noticeable at the outset that these Indians are far different from those of Whitefish Lake, and other bands."[7] Schmidt and L'Heureux recommended a reserve of 25.4 square miles, based on a census count of 127 people present, at one square mile for every five, as stipulated in the terms of Treaty No. 8. The band selected a portion of land at the western end of Lubicon Lake for their reserve, a selection that was approved by both levels of government by 1940.[8] The province set aside the agreed portion of land for the proposed reserve, but the federal government had to first conduct a survey of the area before a reserve could be established. L'Heureux returned in 1940 to map the area for the reserve from the air and a ground survey was scheduled for the following year. That survey has yet to take place:

> The first excuses sounded plausible. There was a war on. Surveyors were in short supply. Money for surveys was hard to come by. In fact, a zealous Indian Affairs accountant named Malcolm McCrimmon had forced a delay. He had been tidying up treaty lists with a view to tightening the budget, and his attention was drawn to the many names added over the years in the Lesser Slave Lake region. He demanded that anyone from a family added to a list after 1912 prove pure Indian blood on the father's side, a tall order among bush tribes and one McCrimmon undertook to enforce himself. He flew to Lubicon Lake on June 3, 1942, arriving at 5:30 p.m., the moment in history that ends the era of benign neglect and begins the modern period of officially sanctioned sabotage of the Lubicon Cree. 'No speeches, we are pressed to leave,' McCrimmon announced to those gathering around him....[9]

From a list of 154 Lubicons, McCrimmon removed 90 members at the outset, paying treaty annuity to the remaining only. All others in the group were deemed "non-Indians" or "half breeds."[10] This move was especially disastrous for the Lubicon because most of their registered members were not added to any membership list until the 1920s and 1930s, and more than half their people had never registered at all. People not registered were ineligible to receive band funds distributed by DIAND. In 1939, during the government recognition of the band's existence, all parties were aware that many Lubicon people were not in a membership list. It was also known that many more Lubicons were out in the bush and, therefore, were unable to register when the official band list was made up at the time. Officials acknowledged the problem during that visit and made allowances for the "absentees" to be added later to the band list.[11] Hence, the department's 1942 policy and decision to trim an already incomplete Lubicon band membership list was contrary to the 1939 agreement. The government, for its part, acted in response to pressures of rising costs in Indian administration. Following an inner-department study conducted in 1942 on band lists of the Lesser Slave Lake region, it was found that the number of additions to those band lists was too extensive. As a result, the department discharged 700 individuals from the treaty lists on the grounds that their parents or grandparents were white or Métis.[12]

The Lubicon and other bands affected by the removals protested the government's actions, and the Member of Parliament for Peace River, Jack Sissons, took their cause to Ottawa, pointing to the government that

> ...striking these persons off the lists was arbitrary, discreditable and indefensible; that these were Hitler tactics; that the Government has broken faith with the Indians; that the action indicates that there is in the Department lack of proper knowledge of the Indians and the territory; that the Indians are being treated like dogs; that this is oppression of the weak by the strong; that these people have no-one to fight for them; that the Department is indifferent and unsympathetic to the welfare of the Indians; and generally that the action is contrary to both the spirit and the letter of the Indian Act.[13]

The Department responded by commissioning a study to look into the situation. On 30 June 1943 the report by Judge McKeen was released and it did not applaud the government's stand:

> ...Your instructions to me ...say that the facts are relatively simple and will not require any argument of those who are protesting against the removals... This may be the opinion of the Department but it is not mine, after reading the Indian Act and Treaty No. 8, then a book "Treaty of Canada with the Indians" by Morris (who was at that time Lt. Gov. of Manitoba and one of the Treaty 8 Commissioners), the Domestic Relations Act of Alberta and the Criminal Code... Mr. McCrimmon has... followed the principles governing ineligibility... signed by Deputy Minister Charles Campbell... (however)... with all due respect... I cannot concur (with the removals) when I study Treaty No. 8 and previous commitments made by various Commissioners appointed by Canada and acting for Canada.[14]

The controversy continued and the government set up a judicial inquiry in 1944. Judge W.A. Macdonald, head of the new inquiry, not only agreed with the previous findings, but recommended that the department reinstate most of the Lubicon Lake Band members removed from membership lists. His judgement reflected an awareness of the complexity of the issue and recommended a more humane treatment of all native peoples concerned with the controversial band list removals. Because the government justified the removals from the band lists in the Lesser Slave Lake region by pointing out that the removed persons were of mixed blood, Judge Macdonald responded with historical references:

> It is well known that among the aboriginal inhabitants there were many individuals of mixed blood who were not properly speaking Halfbreeds. Persons of mixed blood who became identified with the Indians, lived with them, spoke their language and followed the Indian way of life, were recognized as Indians. The fact that there was white blood in their veins was no bar to their admission into the Indian bands among whom they resided...
> When Treaty No. 8... was conducted in 1899, a large proportion of those admitted into treaty at that time were of mixed blood....
> In his report dated May 31, 1901, approved by Order P.C. 1182, Commissioner [J.A.J.] McKenna says: -
>
> 'I have taken it that everyone, irrespective of the portion of Indian blood which he may have, who enters into treaty, becomes an Indian in the eye of the law and should, therefore, be treated as an Indian both by the Department of the Interior and the Department of Indian Affairs.'
>
> I am quite unable to reconcile this definite pronouncement with the view that individuals of mixed blood who have been in treaty for a great many years can now be removed from the band rolls and from the reserve on which their lives have been spent, on the ground that they are not now and never have been Indian.
> It seems to me that the meaning of the word 'Indian'is sometimes unduly restricted....

Moreover, argued Judge Macdonald, whenever possible, Treaty No. 8 should be interpreted as the aboriginal people involved understood it:

> An Indian treaty... should not be construed according to strict or technical rules of construction. So far as it is reasonably possible, it should be read in the sense in which it is understood by the Indians themselves. When Treaty No. 8 was signed the Indians were well aware that the Government took a broad and liberal view with respect to the class of persons eligible for treaty. Many of them taken into treaty at that time were themselves of mixed blood. They knew that individuals of mixed blood who had adopted the Indian way of life were encouraged to take treaty. They cannot reconcile the removal from the band rolls of a large number of individuals of mixed blood who have been in treaty for many years, with their understanding of the situation as it existed when the treaty was signed.
>
> The Indian Act is loosely drawn and is replete with inconsistencies. I venture to say that flexibility rather than rigidity and elasticity rather than a strict and narrow view should govern its interpretation.[15]

Of the 294 people that the judge suggested be reinstated to all the bands affected, the department only accepted 129. The official response to the Lubicon's specific situation was unsatisfactory for the band:

> Of the 90 Lubicon Lake Band members removed, for example, Judge Macdonald heard 49 appeals. Of the 49 appeals he heard, Judge Macdonald recommended the reinstatement of 43, and special consideration for the remaining six. McCrimmon, however, agreed to the reinstatement of only 18. McCrimmon would later argue that those who did not appeal accepted their removals. He was wrong, at least with regard to our people. Lubicon Lake Band members at the time lived scattered throughout a large, inaccessible area, without roads, phones, radios or newspapers. Few spoke English, fewer still could read or write. Many didn't know what was going on; others knew what was going on but just simply decided not to participate. They lived in the bush, on their own

> with little outside contact and little inclination to spend their time debating with McCrimmon or anyone else whether or not they were Indians.[16]

The stalemate continued until 1952, when, on 17 April, the Alberta Director of the Technical Division of Provincial Lands and Forests wrote to DIAND inquiring about the proposed reserve:

> Due to the fact that there are considerable inquiries regarding the minerals in the (Lubicon Lake) area, and also the fact that there is a request to establish a mission at this point, we are naturally anxious to clear our records of this provisional reserve if the land is not required by this Band of Indians.[17]

This letter re-opened an apparently dormant case within DIAND, for the Departmental Supervisor of Reserves and Trusts was suddenly moved to get the Alberta Regional Supervisor to act:

> You will recall that in 1946 C.D. Brown surveyed six parcels of land... for purposes of Indian reserves... On his program for the same year was a survey at Lubicon Lake but it is our understanding that he was not able to undertake this survey during the field season and it was left over until another year. In so far as we can tell from our records, this proposed reserve seems to have been forgotten since then and our attention has (now) been drawn to it... I shall be pleased if... you can advise whether you consider there is (still) a need of a Reserve at this point, for if so, we will give consideration to having it surveyed, possibly this year, and if not, certainly the following year.[18]

The local Indian Agent was thus asked to look into the situation, but he reported that the original site for the Lubicon Lake Band reserve was too isolated and would be inconvenient to administer. He was then instructed to meet with the band to select a new location for the reserve, but the band refused because the new proposed site was located outside the area traditionally used by the band. A second meeting was set up for the same purpose, and the Indian Agent was informed by his supervisor that "Regardless of the result of such a meeting, I certainly recommend the procuring of land (at a more convenient site)."[19]

At stake here was the question of mineral rights, which federal officials had not mentioned during the talks with the Lubicon Band. In fact, the Alberta Regional Supervisor indicated the federal government's ambivalence on this matter:

> It is recommended that the twenty-four sections of land set aside for a reserve at Lubicon Lake be exchanged for (a more convenient site)... I interviewed the Deputy Minister of (Provincial) Lands and Forests... (and)... he stated that he did not have any objections to the transfer though there was no assurance that the mineral rights could be included with (the more convenient site)... If this reserve (at Lubicon Lake) is retained, the Band would have the mineral rights... I would recommend the exchange be made even if the mineral rights cannot be guaranteed (at a more convenient site).[20]

Yet another meeting was held between the local Indian Agent and the band on 4 June 1953, the former's report indicating the impasse:

> I explained to Band members present that it would be impossible to administer a reserve at Lubicon Lake because of the lack of transportation, but the members continued to ask for the reserve which has been set aside for them by the province of Alberta.[21]

Later that year, on 22 October 1953, the province requested a clarification of the federal government's position:

> It is some years now since (the Lubicon Lake site was provisionally reserved)... (and) ...it would be appreciated if you would confirm that the proposal to establish this reservation has been abandoned. If no reply is received within 30 days, it would be assumed that the reservation has been struck from the records.[22]

The federal government made no reply. In the meantime, some band members applied for enfranchisement, some had their names transferred to other membership lists, and officials began questioning the existence of the band itself.[23] At this time, the Alberta Regional Supervisor requested the assistance of the Departmental Regional Supervisor, whose staff was instructed to

> ...consult the appropriate files and advise whether action was taken by the Department to officially establish (the Lubicon Lake Band) as a Band, for at this time any such action appears rather short-sighted, and if this group was never established as an official band it will serve our purpose very well at the present time.[24]

The Lubicon persisted in their struggle, although, admittedly, they have been affected by numerous setbacks, as the band readily admits:

> All of these various strategies to make us disappear as a Band ultimately failed, and in 1973 our existence as a separate Band was reaffirmed by Order-in-Council. However these strategies were not totally without effect. We still have no reserve lands. Some of our Band members have never been added to the Treaty list. Others were removed and never reinstated. Some Band members have been enfranchised. And some Band members have had their names transferred to the membership lists of other Bands, in spite of the fact that they were born and raised in our community, in spite of the fact that they have lived all their lives in our community, in spite of the fact that they have never considered themselves to be members of the Bands on whose membership lists their names appear, and in spite

> of the fact that they have never been considered to be members of those other Bands by the legitimate members of those other Bands.[25]

The Lubicon struggle with authorities who questioned the Lubicon's band status corresponds with the history of band definition by the Canadian government. While officials tended to be liberal in defining "band" and "Indian" in the mid-nineteenth century, restrictions were added to later revisions, perhaps reflecting a growing sense of limited resources coupled with growing demands for the land. For example, in 1850 an Act was passed in Lower Canada which defined "Indians" as follows:

> First.- All persons of Indian blood, reputed to belong to the particular Body or Tribe of Indians interested in such lands, and their descendants.
>
> Secondly. - All persons intermarried with any such Indians and residing amongst them, and the descendants of all such persons.
>
> Thirdly. - All persons residing among such Indians, whose parents on either side were or are Indians of such Body or Tribe, or entitled to be considered as such: And
>
> Fourthly. - All persons adopted in infancy by any such Indians, and residing in the Village or upon the lands of such Tribe or Body of Indians, and their descendants.[26]

This legislation did not define "Body," or "Tribe" or "Band," apparently accepting members "reputed" to belong to such groupings as enough evidence. Also, a relatively broad definition was applied to determine who was an "Indian," including "All persons" intermarried with or adopted by "such Indians." A year later, however, another Act was passed to repeal this earlier legislation, stipulating that "it is expedient to designate more accurately the persons who have and shall continue to have a right of property, possession or occupation in the lands and other immoveable property belonging to or appropriated to the use of the various Tribes or Bodies of Indians residing in Lower Canada." People to be considered "Indians" now had to have some "Indian" blood:

> Firstly. All persons of Indian blood, reputed to belong to the particular Tribe or Body of Indians interested in such lands or immoveable property, and their descendants:
>
> Secondly. All persons residing among such Indians, whose parents were or are, or either of them was or is, descended on either side from Indians, or an Indian reputed to belong to the particular Tribe or Body of Indians interested in such lands or immoveable property, and the descendants of all such persons: And
>
> Thirdly. All women, now or hereafter to be lawfully married to any of the persons included in the several classes hereinbefore designated; the children of such marriages, and their descendants.[27]

One now sees an exclusion of all non-native people from "Indian" status, except for women marrying "Indian" men and their descendants, whereas before both women and men married to "Indian" persons were also considered "Indian." As for "Tribe" or "Body of Indians," there was still no clear definition of these terms at this time. It was not until 10 June 1857 that the Province of Canada passed "An Act to Encourage the Gradual Civilization of the Indian Tribes in this Province, and to Amend the Laws Respecting Indians." The Act did not deviate from the previous law regarding the definition of "Indian," but did stipulate that the term "'Tribe,' shall include any Band or other recognized community of Indians."[28] However, no explanation is provided for the term "Band" nor is there any indication as to the means of "recognizing" a community of "Indians" as a "Band" or "Tribe."

These earlier Acts were applicable to a specific territory, namely Lower Canada, but they were to influence later legislation of a federal nature. Following Confederation, politicians grappled with the need for a national "Indian" policy and created "An Act to Amend and Consolidate the Laws Respecting Indians (The Indian Act, 1876)." The legislators admitted from the start that it was "expedient to amend and consolidate the laws respecting Indians," and expediency might have played a bigger role than the formulators were willing to concede. For the first time in the history of the indigenous population in the country, persons of one hundred percent "Indian" blood could be legally considered non-native.

The Indian Act provided a more detailed definition of terminology applied to native peoples, starting with the "Band":

> 1.The term 'band' means any tribe, band or body of Indians who own or are interested in a reserve or in Indian lands in common, of which the legal title is vested in the Crown, or who share alike in the distribution of any annuities or interest moneys for which the Government of Canada is responsible; the term 'the band' means the band to which the context relates; and the term 'band,' when action is being

> taken by the band as such, means the band in council.
>
> 2.The term 'irregular band' means any tribe, band or body of persons of Indian blood who own no interest in any reserve or lands of which the legal title is vested in the Crown, who possess no common fund managed by the Government of Canada, or who have not had any treaty relation with the Crown.[29]

Thus, in order to be considered a "band" under Canadian law, the native group had to have some connection with the federal government, either through the reserve system or through treaty payments. Autonomous bands, living without government control over their lands, or whose affairs were not "managed by the Government of Canada," were labelled "irregular bands." The Act does not specify what "irregular" means, but perhaps one can ascertain that the creators of this legislation were referring to those bands who were not directly regulated by the government. The previous legislation discussed earlier did not apply to native groups outside Lower Canada, but the Indian Act of 1876 specifically stated that the Act "shall apply to all the Provinces, and to the North West Territories, including the Territory of Keewatin." In 1880, however, Prime Minister John A. Macdonald said that the "'wild nomads of the North-West' could not be judged on the same basis as the Indians of Ontario."[30] While that might have been the case in 1880, historians generally agree that the 1876 Indian Act set the tone for legislation concerning native peoples in Canada for the next hundred years.[31]

In addition to the attempts at defining a native "band," the Indian Act of 1876 also provided more restrictive designations to determine who was an "Indian," a provision that would greatly effect the make up of a band:

> 3. The term "Indian" means
>
> First. Any male person of Indian blood reputed to belong to a particular band;
>
> Secondly. Any child of such person;
>
> Thirdly. Any woman who is or was lawfully married to such person:
>
> (a) Provided that any illegitimate child, unless having shared with the consent of the band in the distribution moneys of such band for a period exceeding two years, may, at any time, be excluded from the membership thereof by the band, if such proceeding be sanctioned by the Superintendent-General:
>
> (b) Provided that any Indian having for five years continuously resided in a foreign country shall with the sanction of the Superintendent-General, cease to be a member thereof, or any other band, unless the consent of the band with the approval of the Superintendent-General or his agent, be first had and obtained...
>
> (c) Provided that any Indian woman marrying any other than an Indian or a non-treaty Indian shall cease to be an Indian in any respect within the meaning of this Act, except that
>
> (d) Provided that any Indian woman marrying an Indian of any other band, or a non-treaty Indian shall cease to be a member of the band to which she formerly belonged, and become a member of the band or irregular band of which her husband is a member:[32]

With this new legislation siblings of identical ancestry could be divided by the federal government into two categories, "Indian" and "Non-Indian," depending on the gender of the individual and her/his marital partner. Children born out of wedlock could also be considered "non-Indian" regardless of the "Indianness" of the parents. This legalistic approach toward defining a group of people could reach absurd proportions, as will be seen later with the Lubicon. Suffice to say here that the Indian Act and its numerous amendments were bound to cause serious disruptions within existing bands because their membership was no longer to be determined along community, familial, or traditional ties, but whether the individual was female or male, and whether the person was born before or after certain legislation. Significantly, the 1876 Indian Act also states that "The term 'person' means an individual other than an Indian...."[33]

The 1876 Indian Act had numerous revisions and amendments, but these did not change the definitions of "Indian," nor was band formation clearly addressed. It was not until 1951, with "An Act Respecting Indians (The Indian Act, 1951)," that the government tackled the difficult terminology attached to Canadian native peoples. Beginning with the "band," the 1951 Indian Act indicated that:

> "band" means a body of Indians
>
> (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after the 4th day of September 1951,
>
> (b) for whose use and benefit in common, moneys

> are held by Her Majesty, or
>
> (c) declared by the Governor in Council to be a band for the purposes of this Act;[34]

The categories for a band now included one that did not have to be managed by the government, but that had received official recognition by the Governor in Council. This same Act also stipulated that "'member of a band' means a person whose name appears on a Band List or who is entitled to have his name appear on a Band List." Thus, for the first time reference is made to a "band list" in order to determine who is a member of a recognized band. The Act elaborates more than any previous legislation on the controversial issue of band membership:

> 5.An Indian Register shall be maintained in the Department, which shall consist of Band Lists and General Lists and in which shall be recorded the name of every person who is entitled to be registered as an Indian.
>
> 6.The name of every person who is a member of a band and is entitled to be registered shall be entered in the Band List for the band, and the name of every person who is not a member of a band and is entitled to be registered shall be entered in a General List.
>
> 7.(1)The Registrar may at any time add to or delete from a Band List or a General List the name of any person who, in accordance with this Act, is entitled or not entitled, as the case may be, to have his name included in that List.
>
> (2)The Indian Register shall indicate the date on which each name was added thereto or deleted therefrom.
>
> 8.The band lists in existence in the Department on the 4th day of September 1951 shall constitute the Indian Register....[35]

Further on the 1951 Act allows for the individual to file a protest on a removal from a band list, but the decision of the Registrar is "final and conclusive." Although the native person can appeal to a judge, selected by the Department, the judge's decision is also "final and conclusive."[36] Furthermore, the Act gives the government a broad range from whence members might be deleted from a band list, including: "10. Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be." The 1951 Indian Act stressed that "Indian" descent was to be determined through the male line, and only as a result of a legitimate relationship. Although an illegitimate child of a native was eligible to be added to a band list, the 1951 Act indicated that this provision could only apply "to persons born after the 13th day of August 1956." In addition, another restriction was included to cover this provision on illegitimate children, for subsection (2) of Section 12 states that

> The addition to a Band List of the name of an illegitimate child... may be protested at any time within twelve months after the addition, and if upon the protest it is decided that the father of the child was not an Indian, the child is not entitled to be registered under that paragraph.[37]

Not only did the 1951 Indian Act stipulate who could be included on a Band List, it also indicated who was not entitled to be registered, including "a person born of a marriage entered into after the 4th day of September 1951 and has attained the age of twenty-one years, whose mother and whose father's mother are not persons [as described above]."[38] Again, depending on the date of a child's birthday, sisters and brothers could be legally appropriated a different ethnic stamp. More importantly, perhaps, families and bands would lose the corresponding benefits. Not surprisingly, critics have generally denounced government attempts to "amend" the Indian Act:

> The astonishing feature of the amendments up to 1950 is how little, despite their frequency, they sought to accomplish. They were always preoccupied with details and never contradicted the basic rationale of the Indian Act, which demanded "civilization" and responsibility from the Indian population while denying them control over the forces affecting their lives.[39]

This perception might also apply to the general policy after 1950, especially in relation to the wranglings over membership lists. The Lubicon were still struggling with this issue in the 1980s, and their membership problems followed a similar path to that taken by the evolution of the Indian Act. As discussed earlier, upon first contact with government officials the Lubicon were given fairly liberal assurances regarding their membership list. Allowances were made for those who were away during the 1939 census visit and promises were made about their future inclusion in the official list made at that time. However, the Department did some reevaluation in the 1940s on bands and band lists, at a time when land was once again in demand following the return of soldiers from fighting in the Second World War. The 1951 Indian Act was the most restrictive legislation to-date dealing with native peoples, limiting who was legally "Indian," and, subsequently, who could be registered on a Band List. At that time, as has been shown, officials attempted to question the Lubicon Band's existence. The Lubicon were not officially recognized as a band until 1973 by Order-in-Council. As far as the Lubicon are concerned, however, they have always been a band. Elders in their community have attested in affidavits conducted by ethnologists that their oral history indicated that they had been a band for many generations beyond present memory.[40]

Questions regarding the Lubicon as a band did not stop with the band itself. Individual members of the band were put on or taken off the list over the years, depending on the contemporary policy in native administration. For example, during the McCrimmon incident in the early 1940s, John Felix Laboucan was struck from the Lubicon membership list, even though he had been born and raised in that community. In 1930, however, he had been added to the Whitefish Lake band list, and was cut from it in 1943 by the Department. The

Macdonald judicial inquiry recommended that he be reinstated to the Lubicon band list in 1944, but he was among those who never were accepted back in any list by the Department. It was not until 1979 when Laboucan hired a lawyer that he was able to receive official recognition as a bona fide Lubicon Cree.[41] Others affected by the 1942 removals included the Roger Letendre and Bella Auger family of 14 children, nine of whom were not considered "Indian." Following this type of separation, McCrimmon was able to argue that "The number of Indians remaining on the membership list at Lubicon Lake would hardly warrant the establishment of a reserve."[42] This ostensibly small number of Lubicons was further reduced by the 1951 Indian Act. For instance, one member family had their offspring divided in half. Six who were born prior to the effect of the 1951 legislation were considered "Indians" by the government, while six born after the new policy were treated as "non-Indians" even though all twelve children had the same mother and father.[43] Despite the government categories, however, the Lubicon lived together as a community, self-sufficient and relatively unmolested by officialdom. By the 1970s, this, too, would change.

b) Seeking a political remedy:

Although the Lubicon have struggled with the Canadian government at least since 1939, it was not until the 1970s that their battle became more pressing. Prior to that time the Lubicon Lake area was difficult of access and there was little intrusion from outsiders. In 1979, however, the Alberta government completed construction of an all-weather road through the region, which brought an influx of oil companies with their heavy exploration equipment; by 1982 there were 400 oil wells within a fifteen mile radius of the Lubicon Band community. Such activities as drilling wells and putting in pipelines were not conducive to maintaining a viable environment for the wildlife, upon which the Lubicon people depended for their livelihood.

The road provoked an incident with little precedent in Canadian legal history. Fearing the consequences that its construction would entail, the Lubicon and some other affected groups, calling themselves the Alberta Isolated Communities, sought to file a caveat gainst the Alberta government in 1976. The purpose of this procedure was to halt construction of the road by officially declaring the natives' claim to 33,000 square miles of land in the area, based on their unextinguished, aboriginal title. The provincial registrar refused the caveat request, forcing the Lubicon and the others to seek court action. The provincial government in turn was granted a postponement on the case until the decision was rendered in a similar case in the Northwest Territories. Although the aboriginal claimants lost their case in the Northwest Territories, the court indicated that the decision would have favoured the native claim had the law in the Northwest Territories been written like the one in Alberta and

Saskatchewan. The Alberta government took this cue and changed the pertinent legislation, making the changes retroactive to a date prior to the file for caveat. The court case of the Alberta Isolated Communities was dismissed in 1977.

This retroactive legislation caused an uproar. First introduced in the Alberta Legislature on 25 March 1977, the purpose of Bill 29, The Land Titles Amendment Act, 1977, was "to clarify the interpretation of The Land Titles Act respecting the filing of caveats. It's intended to be consistent with what the government and the legal community have always understood the law to be in this area,"[44] explained Alberta's Attorney General, James L. Foster. He further admitted that the Alberta government was compelled to make this change because of the recent court decision in the Northwest Territories:

> ...the reason for bringing this legislation forward at this time - specifically its retroactivity - had to do with comments by the Chief Justice of Canada in the Paulette case. Because of the construction placed on Alberta legislation, or the impression left with the court and now with the legal community as to the legal effect of Alberta's legislation, we felt it necessary to clarify the law. Normally retroactive legislation is not produced by this government, or most other governments, and it's only in circumstances such as this where it needs clarification going back to the time when the loose title system was introduced that we felt it appropriate to bring this matter forward.[45]

The opposition reminded the provincial government of the public concern over this issue, including an outcry from the Canadian Civil Liberties Association. The Alberta government received a request from the Alberta chapter of this body to make a submission on Bill 29 pointing out their misgivings, but the Attorney General felt that these apprehensions were somewhat misguided:

> ...they may not have been aware that the government's intention was to clarify the law and not to take away from any individual or group of individuals - in the case... [of] native groups - any rights in law they have to commence proceedings in the courts to determine whether or not aboriginal rights exist. Accordingly... in my judgement there is no attempt in this legislation to remove rights.[46]

Foster reiterated that since the concerns of the Canadian Civil Liberties Association were based on a "misunderstanding" he did not think that a meeting with the group was necessary.[47] Asked if the government was considering "public hearings in view of the magnitude of the bill," he replied that he did not feel that "public hearings add any particular advantage to this legislation." In response to a question regarding his comments on the opinion of the legal community, and "whether or not there have been any studies as to the nature of the original law with respect to the caveat question and also legal opinion," Foster said that he had been advised "by competent men and women of the legal fraternity."[48]
Other critics feared that Bill 29 might counter provisions of

The Individual's Rights Protection Act and The Bill of Rights, but the Attorney General assured the Legislature that there was no conflict with the amendments.[49] On second reading of Bill 29 the Attorney General indicated once again the nature of the new legislation:

> I should underline and emphasize, perhaps, that it is not the intention or scope of our land registry system to accommodate to the filing of caveats for which no certificate of title has been issued or is in the process of being issued. Indeed we felt it appropriate to clarify the law particularly with respect to Section 136, to ensure that the relationship of the caveator, or the applicant, was tied in some direct sense to the owners of the property or others who have interests in the property. Therefore we intend to make it clear with the amendments in this legislation, and particularly to ensure that no caveat can be registered for which no certificate of title has been issued.[50]

Since the Lubicon Band did not possess a "certificate of title" for their land, they were barred from filing a caveat, but Foster insisted that the notion that Bill 29 denied certain groups their rights was "completely inaccurate":

> ...the public, this House, the citizens, perhaps those who have presented petitions concerned about this point, should be careful to draw the distinction between the 'fileability' of a caveat and their entitlement to land.I emphasize that the amendments in Bill 29 will of course have something to do with the 'fileability' of caveat. The amendments to Bill 29 have nothing whatever to do - and may I underline those words - with whether or not any group of citizens in this province is entitled at law to an interest in land and to the ownership of that land. The only way that question can be resolved at law is through the court, in a different type of legal proceeding....[51]

Interestingly, though, the Attorney General planned to implement an additional "clarification" in order to alleviate some concerns, "particularly to oil company interests and others" and dispel the doubts expressed "by the legal and the commercial communities."[52]

The opposition declared that the enactment of Bill 29 was tantamount to a "black day" in the history of the province, for the government was showing a "disrespect for civil liberties in Alberta." A Social Credit member of the Legislature of Alberta (MLA), Walter A. Buck, was especially criticial of the retroactive aspect of the amendment and pointed out that this was the second time that the Conservative government had brought in retroactive legislation in one year.[53] "What we are really discussing this morning... is that the government in its all-powerful position has the ability, and has used that ability to bring in retroactive legislation. That is the real, real danger."[54] He contended that the 1972 Alberta Bill of Rights was not worth "the paper it's written on" because of the retroactivity of Bill 29; in Buck's opinion the amendment removed "the right of the individual to equality before the law and the protection of law." Buck was also concerned with the government's priorities in enacting Bill 29 which, he felt, defended the interests of large groups with political and economic clout. Small groups like the Lubicon Lake Band did not have the resources to defend themselves, and to expect them to use the courts to protect their rights showed "callousness" and "indifference" toward the needs of minorities:

> ...the inherent danger [is] that any group or groups can be picked off in the future... there is a very, very important issue at stake. That is, the power of this government, and its inclination, which is more deadly than its power, to bring retroactive legislation into this Assembly not once, but twice... It is a dangerous precedent that is being exercised... The people of this province had better be aware of the freedoms that are being eroded under this type of legislation.[55]

A New Democrat MLA, W. Grant Notley, pointed out some of the possible implications of retroactive legislation:

> Some people who are eminently qualified and respected across the country for their concern about civil liberties are saying, what are you doing, with this legislation? It's not just a case of tidying up the act...
>
> What will this law do? ...right in the middle of a court case it is taking away the right to file a caveat. Right in the middle of a very expensive court case that has cost the native people of this province a large amount of money. We know that in any legal battle it's easy for either large corporations or governments to delay, to procrastinate. They've got the money to finance the legal battles one step at a time, or to delay. But for other groups, particularly underprivileged groups, justice delayed is justice denied.
>
> What we're really saying... is that we have told the native people of Alberta, yes, go to the courts, but only if you lose. If we think we might lose, we'll change the law retroactively.[56]

Notley questioned the government's motives in bringing in Bill 29 since it effectively denied the native people a route in their land claims struggles:

> The land was occupied by the people in question for generations. The isolated communities consist of people who never signed away their aboriginal rights. But the majority of the people, and

> certainly the seven chiefs and headmen who filed the caveat action, represent a group of people who were missed when the treaties were signed. They have a claim, and it's not for me to judge... But what I think we have to ask ourselves is, do we have a right to deprive them of an important legal mechanism?[57]

Notley was aware of the difference between a land claim and the filing of a caveat, but he also stressed that there was confusion between the filing of a caveat and a freeze on development, as the government suggested:

> What a caveat would do... is simply put the parties to any future development on notice that there is an interest which will be adjudicated, that if they go ahead at their own risk recognizing they have to take into account the interests of the people who have lived in that area for generations. We must also recognize... that a caveat is not necessarily granted just because it's filed. It must be demonstrated to the satisfaction of a judge. ...But what is important on the part of the people in these communities, as I understand it from talking to them, is that they want to make a collective case for their land claims, that they feel they have land claims, and that they feel the only way they can make the judicial system work effectively for them is to file a caveat so at least developers in the area are put on notice that there may be an interest. Little point in gaining land claims, if development has taken place without any consideration of the possible implications for the people living in the community.[58]

The government responded that the filing of a caveat "does not and would not enhance the position of the aboriginal claims in any respect other than in a harassing manner," and that the only thing the native people would have achieved would be to cause "an embarrassment to the government." Furthermore, claimed Conservative MLA Leslie G. Young, to allow the caveat in question to go through would be to "destroy the land title system in this province," for the caveat would affect approximately 5,000 land holdings in the Peace region:

> ...had this application to caveat been successful... every title holder in the town of Peace River would have woken up one morning and found his title was clouded - that he had a caveat against it, couldn't get a mortgage and couldn't sell freely. Now I ask you: in that event, who are the powerless, who are the innocent? What is the nature of the question before us?[59]

The debate over the caveat revealed a real concern for the government: interference with development in northern Alberta. Faced with conflicting interests, the provincial government took a stand for the rights of those who had "some" right to the land. "I'm not concerned about those who want to claim the whole massive area in the north," said Independent MLA Gordon Taylor. In the government's arguments, emphasis was placed on the necessity of facilitating development rather than hindering it. The Lubicon caveat application was seen as a real threat to the land tenure system in the province, which provided for the "orderly transaction of land." Thus, "Bill 29 is intended to prevent abuse of the system of law which is the cornerstone of our society."[60] Nor was the government only worried about hampering development which appeared to benefit certain groups of Albertans. Sensitive to criticisms of neglecting the native cause, the Conservatives responded that the new legislation was actually for the natives' own good: "By ascension into law of this bill we will be assisting those native people in real need of our support, by indicating that we are prepared to accommodate their objectives under treaty and our obligations. We do not wish to inhibit their individual growth by curtailing total development of the north."[61] However, the government had its own ideas on what its obligations were to the native population of the province. As one MLA stated, the purpose of the Alberta treaties was evidently "not to contain the development of the people; its intention was rather to create an orderly and just settlement of all the land."[62] Consequently, the Alberta government had established the Land Tenure Secretariat on 3 June 1975 to provide legal title to eligible people living in public land in northern Alberta, but officials saw a need to encourage "the individuals involved to develop the personal responsibilities inherent in land ownership."[63]

Criticism of the government's position was heard outside the Alberta Legislature. With only four members in the opposition, the Conservatives were confident in the House, but concerns poured in from across the province and the country. Petitions were presented from citizens living in isolated communities who opposed Bill 29; numerous schools sent their own petitions declaring their opposition of the legislation; the Edmonton and District Council of Churches expressed its concerns, and so did the Edmonton presbytery of the United Church of Canada; a telegram from 100 university chaplains was forwarded to the government urging the setting up of a royal commission to study the implication of the amendments to the question of land claims; the Alberta Human Rights Commission feared that the new legislation was discriminatory; and the Canadian Civil Liberties Association held public meetings to discuss the implications of Bill 29, including one meeting on 3 May 1977 at Garneau United Church, Edmonton. It was this gathering that particularly bothered the government of Alberta because some of the guest speakers, including journalist Pierre Berton, were "outsiders" fomenting discord in the province. "I know the civil liberties group from Ontario were in part behind it," said the Attorney General. As a result, Taylor argued, the growing controversy over the legislation could be questioned and even dismissed:

> ...the Hon. Member for Spirit River mentioned we should be flattered because Pierre Berton came to Alberta to speak about human rights. Personally, I think there's plenty of human rights in the east he could speak against without shoving his nose into our business. The people of Alberta can handle their own affairs without interference from some arrogant radio man from Toronto. I resent him coming. I would wager - maybe I'm wrong -but I'd wager somebody paid his way. I would bet on it. When he pays his own way out here, I might have some reason to listen to what he has to say.[64]

By the time the caveat controversy errupted, the Lubicon had learned that they could no longer ignore the troublesome signs in their horizon. Instead of escaping into the bush, many Lubicon families had moved five miles from their traditional area into Little Buffalo where their children could go to school. They would meet the new challenges with newly acquired skills. "Nobody understood what a government was or how to approach one, and they decided the only thing to do was to get thoughtful, observant kids... into school."[65] As the Alberta government debated whether or not the Isolated Communities were being influenced by outside rebels, the Lubicon were grooming one of their own to lead them into the uncertain future. In 1978 Bernard Ominayak, 28 years old and with a grade 10 education, was elected to the Lubicon Council and two years later he became Chief of the band. No amount of schooling could have prepared him for the obstacles ahead of him, for no one could have foreseen the tumultous roads awaiting the Lubicon in the 1980s.

ENDNOTES

[1] As cited in Mair, Through the Mackenzie Basin, 56-59.

[2] Ibid., 64.

[3] Ibid., 66. See also Dennis F.K. Madill, Treaty Research Report: Treaty Eight (Ottawa: DIAND, 1986), Alberta Provincial Archives Collection, 48.

[4] As cited in John Goddard, "Double-Crossing the Lubicon: How Edmonton and Ottawa turned Indian Giver," Saturday Night (February, 1988), 4.

[5] Ibid.

[6] Ibid.

[7] Ibid.

[8] The Lubicon Lake Band, "Lubicon Lake Band Presentation to the Standing Committee on Indian Affairs and Northern Development, Wednesday, May 18, 1983," in Lubicon Lake Indian Band Land Claim: General Historical Information May 1983-February 1987 (Boreal Institute Collection, University of Alberta), 2.

[9] Goddard, "Double-Crossing," 4.

[10] Lubicon, "Standing Committee," 2.

[11] Ibid., 3.

[12] Madill, Treaty Research Report, 89.

[13] As cited in Goddard, "Double-Crossing," 6.

[14] As cited in Lubicon, "Standing Committee," 4. The report erroneously indicated that Lt.-Gov. Morris was present at the Treaty No. 8 negotiations in 1899. Morris died in 1889. I was unable to find a copy of the report by Judge McKeen cited by the Lubicon in their literature. The National Library in Ottawa could not locate it either. His first name is unknown. Also note: Square brackets are used whenever I add something to the quoted text. Much of the material available from the Lubicon files has bracketed information on it, presumably added by the band.

[15] Report by Mr. Justice W.A. Macdonald, of the Supreme Court of Alberta, The Court House, Calgary, Alberta, 7 August 1944. As recorded in Special Joint Committee of the Senate and the House of Commons appointed to continue and complete

the Examination and Consideration of the Indian Act, Minutes of Proceedings and Evidence, No. 12, Monday, 21 April 1947, National Library (Ottawa) Archives, (Ottawa: King's Printer, 1947), 557-559.

[16] Lubicon, "Standing Committee," 5.

[17] As cited in Ibid., 5-6. Material in parenthesis was on the copies provided by the Lubicon.

[18] Ibid., 6. Emphasis on copy - added by the band.

[19] Ibid., 7.

[20] Ibid., 7-8.

[21] Ibid., 8.

[22] Ibid.

[23] Ibid., 10-12.

[24] Ibid., 12. Emphasis on copy - added by the band.

[25] Ibid., 12-13.

[26] "An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada," as cited in Derek G. Smith, Canadian Indians, 40.

[27] "An Act to Repeal in Part and to Amend An JCT, Intituled, An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada" (1851), Ibid., 47-48.

[28] Ibid., 51.

[29] Ibid., 87.

[30] As cited in J. Rick Ponting and Roger Gibbins, Out of Irrelevance: A socio-political introduction to Indian affairs in Canada, (Toronto: Butterworths, 1980), 16. See also Tobias, "Protection, Civilization," 45.

[31] See, for example, Ponting, Out of Irrelevance, 8, 12; Frideres, Native Peoples in Canada, 30; and Tobias, "Protection, Civilization," 44.

[32] As cited in Derek G. Smith, Canadian Indians, 87-88.

[33] Ibid., 89.

[34] Ibid., 154.

[35] Ibid., 156.

[36] Ibid., 157.

[37] Ibid., 159.

[38] Ibid., 158.

[39] R. Bartlett, Indian Act of Canada, as cited in Frideres, Native People, 31.

[40] This information was provided by Lubicon spokesperson Terry Kelly on November 1, 1989.

[41] Goddard, "Double-Crossing," 6.

[42] Ibid.

[43] Information provided by band adviser, Fred Lennarson.

[44] Alberta Hansard, 25 March 1977, 483.

[45] Ibid., 4 April 1977, 623.

[46] Ibid.

[47] Ibid., 624.

[48] Ibid.

[49] Ibid., 6 April 1977, 672.

[50] Ibid., 6 May 1977, 1206.

[51] Ibid.

[52] Ibid.

[53] Ibid., 1207. In 1976, The Gas Utilities Amendment Act was enacted retroactively in order to circumvent an action by a group of citizens which was then attempting to challenge the power of the Public Utilities Board.

[54] Ibid.

[55] Ibid., 1208-1209.

[56] Ibid., 1210.

[57] Ibid.

[58] Ibid.

[59] Ibid., 1211-1212. The Alberta government could not come to terms with the amount of land the native people were claiming in the province. As recently as 1985, the then Minister of Native Affairs, Milt Pahl, made the remark that: "It's like somebody comes along and says: I'm a direct descendant of Christopher Columbus, and I claim all of North America; therefore I want an injunction so that nobody will turn another scoop of dirt until my claim is satisfied." Alberta Hansard, 18 April, 1985, 460. Pahl would probably have been more astonished to hear that aboriginal peoples in the Americas never believed that Columbus had a just claim to their territory.

[60] Alberta Hansard, 6 May 1977, 1215.

[61] Ibid., 1216.

[62] Ibid., 1215.

[63] Ibid., 1214.

[64] Ibid., 1219, 1218.

[65] Goddard, "Double-Crossing," 6.

CHAPTER IV

THE LUBICON LAKE CREE BAND TO 1990

a) A new leader at the helm:

Referring to Chief Bernard Ominayak, one commentator said in 1988 that "it is hard to imagine today where the Lubicon Cree would be without him."[1] Many of his fellow Lubicons would agree with this statement, for "the band once tried to vote him in for life, an offer he declined."[2] Ominayak has not resolved the Lubicon dilemma, nor has he diminished the band's troubles, but he has changed the character of the struggle. Once a small, unknown group of native people in northern Alberta on the verge of losing their very identity, the Lubicon have surfaced as a force to be reckoned with in the 1980s and in the process have gained worldwide respectability, albeit primarily from non-governmental and perhaps non-powerful groups and individuals. Still, it is almost certain to many observers that whatever happens to the Lubicon, they will not go down quietly or unobstrusively. History will not bypass them as it did in 1899.

It is difficult to determine whether it was Ominayak's leadership or a new sense of urgency felt by the whole band in general that gave the Lubicon a spark. Perhaps it was a combination of both. Certainly, the 1980s ushered in new problems for the band that required concerted and deliberate action. Still, Ominayak has been credited with bringing the

Lubicon cause to the provincial, national, and even international limelight:

> He has... become the best-known local chief in the country - greeted with standing ovations at native gatherings - and a household name in Alberta. When the Alberta NDP leader, Grant Notley, died in a plane crash in 1984, Ominayak sat in the VIP section at the funeral. When the Pope toured Alberta, Ominayak shook his band on behalf of northern Alberta Indians. A European congress on aboriginal rights invited Ominayak as featured speaker last May, and the Interreligious Foundation for Community Organization honoured him at an awards banquet in New York City in December for 'valiant, creative,
> 7 and effective' leadership.[3]

One of the effective strategies picked up by the Lubicon in the early 1980s, under the leadership of Ominayak, was to seek assistance outside the band. They realized that alone, they would be isolated and easily ignored by officials. United with other bands with similar problems, coupled with a broad-based support network, the Lubicon would have a better chance. The Lubicon hired James O'Reilley, a lawyer who successfully negotiated an agreement for the James Bay Cree. Advisers were also sought who had experience dealing with native issues and the two levels of government. Next came the creation of a coalition of native, labour, student and church groups across Canada and Europe who helped to raise the public's awareness of the band's plight and who provided support for the band's land claim. The Lubicons became a household name in Alberta, and Peter Big Head of the Blood band in southern Alberta expressed a common view regarding the

Lubicon's position: "The Lubicons are looked upon as the forerunners... They've opened the door. Indian people across Canada must stand firm for what belongs to them."[4] Lawrence Courtoreille, Alberta vice-president for the Assembly of First Nations, concedes that "People are looking toward Bernard as the new leader who can make changes... He is quiet, but he carries the power of his people."[5] It is this sense of unity and forceful determination that has given the Lubicon and their chief a special place in the heart of many Canadians. With skillful use of political leverage, the band has gained a lot of positive media attention coverage. Through Ominayak, the Lubicon struggle gained credibility: "The lesson that native people can learn from his dealings with Ottawa and Alberta is that with strength based on unity and outside support, politicians can be made to realize that the Indian cause is a just one."[6] Soft-spoken and unobtrusive in manner, Ominayak does not appear to be "the real power and driving force" behind the Lubicon. Perhaps this is one of the reasons he has succeeded in endearing his people to the Canadian public:

> Unlike the band's laywer and adviser, he is not given to fancy rhetoric or inflamed, passionate speeches.... Yet it is Ominayak who controls the situation, which has been growing increasingly volatile as more and more outside supporters arrive to take up the fight.[7]

Deliberately orchestrated or not, Ominayak is portrayed as the sensible, reasonable leader of a small group of native people fighting for their very existence. Although he has had to fight his own personal battles along the way,[8] he has managed to always retain a certain amount of dignity. His lawyer, O'Reilley, and his adviser, Fred Lennarson, are both non-native. They do the lashing at the government and developers, saying the things that might need to be said but that might make some people feel uncomfortable. The Lubicon are left squeaky clean. Whether this image was a result of a well-crafted plan might not be easily construed, but, either way, it has worked.

One of the ways that Ominayak succeeded in bringing the Lubicon claim to the fore might have been his sense of timing: "That alone shows skill as a negotiator."[9] As will be discussed later, he was able to maximize his opportunities for publicizing the Lubicon cause, for example, during the 1988 Winter Olympics and the federal election in the fall of 1988. The Lubicon also maintained a sense that they went through all the proper channels, exhausted all the available routes to them, and were now at the mercy of the Canadian people. In their press releases, public statements and forums, the band briefly but assiduously recounted the history of the Lubicon, from their being overlooked by the treaty party in 1899 - through no fault of their own, they point out - to the fact that they still have no reserve while their livelihood has been basically destroyed due to the destruction of the environment by multi-national corporations. At a time when the environment has become a mainstream concern, how can the Lubicon lose the war for public approval?

The Lubicon have won much public sympathy, and perhaps a lot of it has been due to the charismatic influence of their chief, but Bernard Ominayak and his people have endured many wounds from events of the 1980s. Soon after he was elected chief, Ominayak was faced with the prospect of his band losing their reserve even before they received it. In 1981 the Alberta government proceeded with a plan to turn the region claimed by the Lubicon into a Provincial Hamlet. When the band protested the move and refused to co-operate with officials, the provincial government demonstrated once again that it was sensitive to "outside" influence in the Lubicon case. Instead of addressing the criticism that surfaced regarding his Land Tenure Program from the Lubicon and other northern native communities, Municipal Affairs Minister Marvin E. Moore pointed out that those who had signed a petition rejecting the program had done so "with the advice of legal counsel from Montreal," and therefore were suspect:

> In my view the people of the community are being rather badly misled by some misdirected legal advice coming from another part of Canada. That is unfortunate, because what we're really trying to do is provide an opportunity for people in Little Buffalo to have title to land of their own on which they can then construct their accommodations... I for one am not prepared to allow some legal counsel from another part of Canada or members of the NDP

to tear that objective.[10]

The provincial government contended that if the people of Little Buffalo had not been ill-advised on the land issue, the Land Tenure Program "would automatically have carried on as it has in the other three or four areas,"[11] but the Lubicon were concerned from the start. When the province turned the Lubicon area into a Provincial Hamlet in 1981, surveying and dividing the land into two-acre lots, the band sent a telegram to Moore requesting that the program be delayed or cancelled pending a study on the implications of such a program on the Lubicon's land claims. The government felt that it had made a commitment to a number of people who were interested in the program, while the band saw it as another frustrating block. The Lubicon's record of the incident reveals their sense of desperation:

> (The provincial government) tried to force our people to either lease these plots, or to accept them as 'gifts' from the Province. People who supported the Provincial Government's Hamlet and Land Tenure program were promised services and security. People who opposed the program faced all kinds of consequences, including no phone service, no power and no new housing.
>
> Some of our people, building houses outside of hamlet boundaries, were told to obtain Provincial leases or have their homes bulldozed.
>
> Fearing that acceptance of the Provincial Hamlet and Land Tenure Program would jeopardize our land rights, we asked the province to delay implementation of their program until its effect on our land rights could be determined. They refused, stating that they had checked the legal implications of the program and had been assured that there was 'no relation between land claims and land tenure.' When we continued to question the effect

> implementation of their program would have on our land rights, they resorted to a less legalistic form of deception. One old woman, who can neither read nor write, signed a program application form after being told that she was signing for free firewood. Another was told that she was signing for an Alberta Housing trailer. A third was told that she was signing a census form.
>
> When we objected to the dirty tricks Provincial officials were using to try and deceive our people, they claimed that a majority of our people had requested and supported their Hamlet and Land Tenure Program. When we circulated a petition proving beyond any doubt that a majority of people in our community opposed their program, Provincial officials said that they would not 'deny the benefits of land tenure to even a minority.'
>
> When we asked for information regarding what they were planning next for our community, Provincial officials said that our community had already been consulted.
>
> When we asked again that the Province delay implementation of their Land Tenure Program, pending determination of its possible effects on our land rights, Provincial officials again refused, this time claiming that a delay was 'unnecessary' because, they said, participation in their program was 'purely voluntary.'[12]

Provincial officials insisted that the aim of the Land Tenure Program was not to undermine any land claim put forward by a native group. "We established it so people who have been legally living as squatters on public land in Alberta in this day and age would have an opportunity to obtain title to that land, title they need for a variety of reasons."[13] Interestingly, though, the government was not moved to provide "title to the land" to residents of the Lubicon area until the early 1980s when oil exploration was booming. The program might have meant official recognition of individual holdings, but the two-acre lots were also a means of curtailing the previously uninhibited movement of band members. The insistence on individual titles was also contrary to the band's concept of communal land holdings, and hence the program was feared as a possible tool to erode the band as a community. Furthermore, the Lubicon resented being given the label of "squatters" after having lived in that region since time immemorial.

The issue once again was concepts of land that were at variance. Notwithstanding the band's apprehensions, the government was confident that the Land Tenure Program was long overdue: "It's a very good program to give native people title to their own land so they can build their home on their own land and own their own property for the first time in history,"[14] explained Donald McCrimmon, Deputy Minister responsible for Native Affairs. Yet the Lubicon had always believed that they owned the land. As for the band's allegations of pressure put on some members to comply with the program's objectives, and complaints of tricks or misleading tactics in the application process, the government responded that "wherever possible" interpretive services were used "to ensure people understand what they are signing." Marvin Moore insisted that "all those who signed an application for land under the land tenure program in the Little Buffalo community were well aware of what they signed." However, "In view of the controversy surrounding the Little Buffalo project, I've instructed my staff not to pressure anyone into altering their position."[15] One might wonder from this if there had been some pressure put on anyone before the controversy errupted.

In defending its Land Tenure Program, the Alberta government showed yet another questionable aspect of its administrative procedures. Moore boasted that prior to the implementation of the program, his staff had consulted the Native Secretariat, the Department of Energy and Natural Resources and its Minister, the Minister of Telephones and Utilities, the Minister of Transportation, and other departments for their "expertise." It is noteworthy that the native people themselves were not approached for consultation even though the program would greatly effect them. In fact, Moore refused to meet with the band's legal counsel. "It's not my intention, now or in the immediate future, to open any personal discussions with these particular solicitors."[16] It appears that the government was once more suspicious of the band's concerns because their lawyers were not Alberta-based. The Minister responsible for Native Affairs hinted at this sentiment of the government:

> There has been help, and the availability for help is with the Native Secretariat. Everybody knows that. The people in the Little Buffalo area know it. They've had their land tenure program explained to them, then something else comes up, someone from out of the province says, this is going to interfere with your land claims. I'm questioning whether it will interfere in any way, shape, or form with their land claims. But that's for the courts to decide down the road. I see no way that getting legal title to two acres of land through the provincial government is going to interfere in any way with a

native person's land claim now or in the future.[17]

The Lubicon's legal counsel was not so sure that the Land Tenure Program advocated by the Alberta government would not obstruct the band's land claims, and the Lubicon were receiving advice from people who were involved in the James Bay case. This explains why the band sought assistance from out of the province. Provincial officials, for their part, never accounted for their distaste for "outsiders." Perhaps the government's focus on the origins of concerns about its programs was a deliberate strategy to dismiss the criticism, rather than just an expression of parochialism.

b) Fighting in the courts:

If attempts to deal directly with the province were discouraging, the legal course proved equally demoralizing for the Lubicon Lake Band. The Lubicon first approached the courts during the above-mentioned caveat application, which, as has been shown, did not result favourably for the band. Having failed at the provincial court level, the Lubicon sought remedy through the federal court system in 1980, but this route also had its pitfalls. First, the band's action was continuously challenged by some of the defendants on procedural grounds. The province and oil companies argued that the federal court had no jurisdiction on what was to them a provincial matter. The court agreed. While the case against the federal government and the crown corporation, Petro-Canada, continued in federal court, a suit against the province and other oil companies was filed in provincial court. In the meantime, oil exploration and development continued in the band's traditional territory. The Lubicon, therefore, sought to obtain an injunction to temporarily halt the disruptive activities in the area pending a settlement of their land claims. This was the fourth court action by the band.

The Lubicon filed for an interim injunction on 23 September 1982; the application was not heard until 26 September 1983. On 25 October 1983 lawyers on both sides completed their arguments, and judgement was rendered on 17 November 1983. The Lubicon's application was dismissed.

The crux of the band's argument in seeking the injunction was that "what was being destroyed by development activities was a whole way of life which could never be compensated or replaced with money."[18] In order to prove this pivotal point, the band presented affidavits from Lubicon Chief Bernard Ominayak and from prominent community elders, describing their traditional land, the history of their people, their hunting and trapping activities, and the effect development had had on their livelihood. Affidavits were also submitted by Joan Ryan, Chairperson of the Department of Anthropology at the University of Calgary, confirming the distinctiveness of the band's traditional way of life and the possible effects to their culture from oil-related activities; another affidavit from Ken Bodden, wildlife biologist with the Boreal Institute at the University of Alberta, described the band's hunting and trapping activities and related this to the economy of the community; an affidavit by Ben Hubert, a zoologist, showed the possible effects of oil related development on the animals in the band's traditional area; finally, affidavits were read from Gordon Smart, past Director of the Forest and Land Use Branch for the Alberta Department of Energy and Natural Resources, Peter Dranchuk, professor of petroleum geology at the University of Alberta, and Everett Peterson, a forest ecologist. Smart described past, present, and future proposed development in the Lubicon area; Dranchuk discussed the types of development expected in the region; and Peterson gave an assessment of the effects development could have on land-vegetation and biological productivity, including the cumulative effects of development on hunting, trapping and fishing.

Lawyers for the provincial government and oil companies argued that the decrease in wildlife in the area was not due to development activities but to natural cycles of animals, a tick infestation, overtrapping, and decreased trapper effort. The band rejected all these arguments, but especially questioned the theory of ticks and natural cycles. It was not clear to the Lubicon why this phenomenon started "having such a dramatic effect only after the initiation of extensive development activities, nor why tics [sic] and natural cycles were not having the same dramatic effect in the areas outside of those being developed."[19] The band's opponents insisted, however, that the idea of a distinctive native way of life was "nebulous"; that "any aboriginal way of life has already been unalterably affected by the encroachment of modern life," that "the clock cannot be turned back;" and that "it is impossible to do irreparable damage to something which doesn't exist."[20] The judge agreed.

In explaining his decision, Judge Gregory Forsyth of the Alberta Court of Queen's Bench concluded that any damages possibly inflicted on the Lubicon Lake Band could be compensated with money:

> ...to a significant but not complete extent, any damages sustained by the Applicants between the date of the application and the trial of the action were not irreparable but were calculable and could be satisfied by the payment of same by the Respondents. Further, the Respondents had the ability to pay such damages. ...on the basis of the material and evidence before me in this application, adduced by both sides, I am satisfied that damages would be an adequate remedy to the Applicants in the event they were ultimately successful in establishing any of their positions advanced. I have considered very carefully the allegations of irreparable injury or damage not compensable by money and I am simply not satisfied that the Applicants have established in this application such irreparable injury.[21]

The judge did not conclude that the band had not suffered irreparable damage, only that the band had not proven such an allegation. This was of little consolation to an already desperate people, especially when the judge appeared to be much more concerned with financial losses to the oil companies:

> If I was required in this case to consider the factor of adequacy of damages to compensate the Respondents, then I am more than satisfied that the Respondents would suffer large and significant damages if injunctive relief in any of the forms sought by the Applicants were granted. Furthermore, the Respondents would suffer a loss of competitive positions in the industry vis à vis the position of other companies not parties to this action. That loss coupled with the admitted inability of the Applicants to give a meaningful undertaking to the Court as to damages either as individuals, or if authorized to bind the known class, as a class, on which point I have grave doubts, reinforces my decision that injunctive relief in this case is not appropriate.[22]

Not only was the judge concerned with the "significant damages" that the developers would suffer if an injunction was granted, but he also made reference to the point that the band's obvious inability to pay damages if need be at a later date was taken into account - the implication of such a judgment being that only those who can financially afford the consequences will be granted a favourable court ruling. Either way, Judge Forsyth's decision gave a clear message which had a historical ring to it: the "nebulous" native way of life must make way for "inevitable" development by powerful groups.

This court decision had a further twist. The same judge who conceded in the fall of 1983 that the Lubicon did not have a lot of financial security ruled on 6 January 1984 that the band was liable for all costs associated with that case. Judge Forsyth assured the Lubicon that they did not have to pay "forthwith," but the defendants could apply for this payment later on. One Canadian newspaper concluded that the judge "who went all out to beat the band gets perfect 10."[23] The lawyer for the Lubicon could not conceal his dismay:

> It's not over dramatic... to say this is the actual destruction of a people... We are presiding at a requiem, and I feel like our learned friends want to take the corpses out of the coffin and stab them again and put them back in the coffin.[24]

The Lubicon appealed the original decision dismissing their application for an injunction, but on 11 January 1985 the Alberta Court of Appeal upheld Judge Forsyth's ruling. This particular court case showed yet again the judges' tendencies to view the issue as fundamentally a question of money. In fact, one judge asked band lawyer James O'Reilley to "name one single Band of Indians who'd ever tried to stop development for any reason other than to increase the amount of money which the Band hoped to receive from such development."[25] O'Reilley was able to name several examples of bands in Ontario and Quebec who had not agreed to any development until provisions were made to protect their way of life, but the judge wanted Alberta examples. Coming from eastern Canada, O'Reilley was unable to respond adequately about the situation in western Canada. The judge thus persisted that in his view, "the real issue is money, not way of life." The band begged to differ:

> Given the choice of returning to the way of life which they enjoyed before the onset of development activity, and which is truly in great jeopardy, or of all becoming oil millionaires living in condimoniums in Hawaii, there's absolutely no question whatsoever in the minds of people who know the situation that Band members would immediately choose the return to the way of life they knew in the past.
>
> What [the judge] apparently can't comprehend is that the Lubicon Lake people live in a far different world than he and his friends and colleagues. And they are just as uncomfortable in his world as he would be in theirs...
>
> The world of Northern Alberta is of course the world of the Lubicon Lake people. It's a world they know. It's a world where they are comfortable, secure, competent...
>
> The fact is that the Lubicon Lake people don't know any other way of life. They don't know how they would be able to survive living any other place. They don't know how they would be able to survive living any other way.[26]

The judges' insinuation that the band was primarily interested in increasing their financial benefits was disheartening for the Lubicon. The Lubicon have striven to convince the dominant society that what the band has lost, and stands to lose if development continues at the rate and extent it has, is something intangible and yet more precious than any amount of money: their way of life.

> ...the Lubicon Lake people have no experience with great sums of money and the alternative lifestyles which such money can buy. What they know of the outside world is more worrisome to them than appealing or attractive. Thus whatever [the judge] might think, the Lubicon Lake people have a great and a genuine and a really quite easily understood concern over the systematic and deliberate

> destruction of everything they have and know and are as a people.
> Realistically, the Lubicon Lake people don't have the choice of returning to the way of life they lived before the onset of development activity in their traditional area, and they know it, so they are literally stuck with having to try and figure out how to survive that development activity, how to protect as much as they can of their traditional way of life, and how to best make the clearly unavoidable transition from their familiar traditional economy to some kind of hopefully viable mixed economy.[27]

The court was told by the submissions from the oil corporations that one of the reasons for the decrease in wildlife catches was that the natives had "grown lazy and weren't trying very hard."[28] Actually, the provincial government and the oil companies did not even present any arguments at this hearing. After listening to the Lubicon position for four days, the three judges for the Court of Appeal of Alberta announced that evidence from the other side was unnecessary. The court had already reached a decision:

> The claim in truth is based on fear for the future, a fear partly based on what has happened in the reserve area... The real thrust of the claim of the appellants is that, in time, trapping will cease to be commercially viable and there will be a meat shortage... Seismic activity and exploratory drilling is, in the nature of things, temporary. It is conceded that after it ends the wildlife will return in number. We simply do not know whether new fields have or will be found so we do not know if there will be a permanent development beyond the existing fields... In any event, the time-span here is sufficiently short that the plaintiffs could, if successful at trial, gain through damages sufficient moneys to restore the wilderness and compensate themselves for any interim losses... In any event, we agree with [Judge Forsyth] that, on the balance

> of convenience, the harm done to the respondents would far outweigh any harm done to the appellants during the interval before trial.[29]

It is interesting to note that the Appeal judges also felt that the provincial government and oil companies stood to lose a lot more, or suffer a great deal of inconvenience, if the Lubicon were granted an injunction to halt development pending their aboriginal claims trial. What is most telling about the judgement, however, is the contention that "sufficent moneys" could "restore the wilderness."

The Lubicon appealed the injunction dismissal but the Supreme Court of Canada refused to hear their appeal on 14 March 1985 with no explanation. It might be that, like the judges in the Alberta Court of Appeal, the Supreme Court judges felt that the Lubicon would reach a settlement soon through their aboriginal claims trial which was in process at the time, but the legal nightmare had just started. In 1986 a court decision in Newfoundland stated that the federal government could not be sued in a federal court for a land claim within a provincial boundary. The Lubicon, therefore, were forced to drop their on-going suit in the federal court and add the federal government to their on-going provincial action. The federal government opposed this move, and on 22 October 1987 the provincial judge agreed that the provincial court was no place for a claim against the federal government. The Lubicon had run out of courts.

The federal government, in the meantime, vacillated. After having promised the band financial support for their legal struggles, the Minister of Indian Affairs informed the Lubicon that the agreement "could not be honored" because "there was simply no money available...."[30] Later the band was told that financial assistance for their legal costs was refused because "The negotiating route has not yet been exhausted."[31] Considering the fact that the Lubicon Lake Band had been "negotiating" since 1939, the Minister of Indian Affairs was forced to reconsider this position, and finally declared that "funding assistance cannot be provided because the litigation does not fall within the approved criteria for funding assistance."[32]

Despite the lack of support from DIAND, the band proceeded with court action to resolve the question of its aboriginal title. At this time, the band claims that there was a drastic cutback in the band's operating budget. For example, in 1981, the band received $104,174 in core and administrative funds. In 1982, they were initially given $76,336, although much lobbying brought an increase to $101,736. In 1983, they received $51,460, though the Minister insisted "that there was 'no relationship' between (the) legal action and the budget cut-backs."[33] Perhaps the most revealing comment on the government's commitment to the Lubicon issue came from parliamentary secretary Henri Tousignant. Upon hearing the band's concerns, he promised that he "would be prepared to take that to the Minister as soon as possible, and try to have this thing settled as soon as possible, if it is all possible to have it settled."[34]

c) The public reacts:

Support for the Lubicon struggle spread to groups outside government agencies, including the World Council of Churches. Following a visit to the Lubicon Lake area in 1983, the Council observed many abuses "which could have genocidal consequences." The Council concluded that the Provincial government and dozens of multi-national oil companies "deliberately sought to undermine the traditional economy of band members, to subvert the legal rights of Band Members, and to destroy the will and the ability of band members to resist Provincial and oil company exploitation of the band's traditional area."[35] Among the Council's findings were instances of provincial officials "deliberately" allowing fires to burn unchecked, destroying thousands of acres of boreal forest in the band's traditional hunting and trapping grounds; turning hunting and trapping trails into private roads for developers, many of the roads fortified with gates, guards, and "no trespassing" signs. Workers employed by the province and oil companies had been instructed to bulldoze traplines and to fire their rifles into the air in order to scare the game away, an activity pursued so enthusiastically that one participant described it as "almost like a competition." The situation compelled the Council of Churches to write to Prime Minister Pierre Elliott Trudeau urging the government to live up to its historic responsibility:

> The situation of the Band and Band members is thus desperate, crucial, and urgent. They know no other way to live. They have no money, many have never been out of their traditional area. Many speak only Cree. Many neither read nor write. None have completed Grade 12. Those who try to pursue a different lifestyle will both deny their heritage and break their traditional bond with the land, an essential legal requirement of their aboriginal claim. They are literally in a struggle for their very existence as a people with the rich and politically powerful Alberta Provincial Government, and with dozens of multi-national oil companies, each of which possesses more resources than many nation states. They cannot be expected to withstand the concerted effort of the Alberta Provincial Government and dozens of multi-national oil companies without help. They cannot be expected to achieve a just and fair settlement of their legitimate rights and claims without help. They cannot be expected to survive as a people unless they receive immediate financial, political and legal help.[36]

Another church group, the Interchurch Committee on the North, undertook a fact-finding tour of the Lubicon area on 27 March 1984. Under the auspices of Project North, this Committee's findings confirmed the "litany of injustices" against the Lubicon Band. The Committee found that the "well-documented allegations" were "substantially correct" and that the "violations of human rights" were apparent.[37] The Committee's news conference aroused media attention which the government could not overlook. This was followed by the added embarrassment from the findings of the Penner Report, as the

Standing Committee on Aboriginal Self-Government was known, which described the Lubicon situation as "one of the most distressing problems the Committee encountered."[38]

In response to mounting public pressure, the Alberta government conducted an investigation into the band's allegations. For the most part, the Ombudsman found that "much of what my complainants regard as 'evidence,' I must discount as speculation," although he concurred that it was vital to maintain "an important appearance of fairness."[39] He questioned the charge that there had been some "deliberate" destruction in development operations, arguing that this would depend on the definition of "deliberate." For instance, in the case of provincial officials insisting that a school be built at Lubicon Lake despite the protests of the local residents, the Ombudsman stated that he was convinced that public servants "were acting in a way which they thought was to the benefit of the residents of the community."[40] While the bureaucrat was sympathetic to the band's plight and the churches' concern for "moral" justice, the Ombudsman could find no fault with the government for acting within existing law. Above all, he concluded, "An abundance of sensitivity, common sense and good will is called for. While the land claim is in the forefront of everyone's mind, it cannot be allowed to eclipse everything else."[41] While all this was going on, the band reported that the annual income of the average Lubicon trapper dropped by two thirds, from approximately $6,000 in 1982 to $2,000 in 1984. At the same time nearly one million dollars worth of oil was pumped daily in the Lubicon area.[42] One report described the onslaught on the community as "ethnocide"; more than genocide, the intrusion from outsiders was tearing "the very fabric of the meaning of life apart."[43] Band records tell the tale of diminishing wildlife resources: in 1979, band members took 219 moose; in 1981, this number dropped to 110; in 1982, an even more dramatic drop to 37; and in 1983, only 19 were taken. Since then, the annual moose kill has counted in the 20s. The provincial government's response to these figures was that the drop was a "countrywide phenomenon":

> Trapping incomes tend to be down because of the very disastrous impact of the antifur movement and the Greenpeace movement - aligned with certain parties in Canada - who have been so concerned with the welfare of the animals that they've forgotten about the native Canadians who very much rely on hunting and trapping for their traditional lifestyle.[44]

Certainly this argument deserved some consideration, but the opposition reminded the government that this was not the situation with the Lubicon: "The people of Little Buffalo want to sell their furs. It's not that there's not a market for them; it's that they're not able to trap because of oil and gas activity." In that case, responded the Minister responsible for Native Affairs, Milt Pahl, the claimants could apply to the trappers' compensation board which was in operation in order to compensate those people who could prove a loss of income due to gas and oil development. As for the Lubicon specifically, Pahl refused to accept the band's allegations that game had disappeared from their land ever since gas and oil exploration began in the area: "In fact, quite to the contrary. Informal reports have indicated that there is a certain amount of taking of game but quite a reluctance to report it."[45] The Minister based his arguments on information received from an anonymous caller:

> The Hon. Member for Spirit River-Fairview asked the source of my information with respect to the reluctance of certain individuals to report hunting success. The inference was that it was something dishonest with respect to the laws of Alberta. In effect, it was an unsolicited call to my office from a member of the community who indicated that certain members in the community were reluctant to report success in game kills to anyone because it was not in the interests of the group who were managing the publicity to have any hunting success reported. So it was nothing with respect to an illegal action with respect to any laws. It was pressure within the community. It was reported to me. I will not further the problem. It was not slander against anyone or a suggestion of breaking any laws. It was suggested as informal pressure within the community, which again is an unfortunate situation that suggests that we obviously need to make our best efforts to resolve this situation.[46]

Furthermore, on 18 April 1985, the Associate Minister of Public Lands and Wildlife, Don Sparrow, maintained that oil development could actually help wildlife, an argument that the government and oil companies stressed during court proceedings as well:

> During the last two to three decades, because of the lack of forest fires, the habitat in the area has been very dense, which provides for very poor moose habitat. We recently had a fire. We're looking at increased productivity in moose in that area,

> because it has opened up a little. Actually, the oil and gas activity in the area has really improved the access for hunting and also created more habitat. The tick infestation a few years ago cut back on the number of animals in the area and throughout northern Alberta. That has now declined, and the numbers are increasing.[47]

The Lubicon were bewildered but perhaps not surprised by what they saw as a form of justification for the onslaught on their traditional land. As far as Ominayak was concerned, the province "just wants us to give up or go away" because "We don't fit into any of the little boxes they set up."[48] Significantly, an editorial in a major Canadian newspaper stated that "Meaner treatment of helpless people could scarcely be imagined."[49] Yet, a prosperous Métis family, tenant farmers on Lubicon land, opposed the band's stand, claiming that "They don't know how to work.... They should go back to where they came from."[50] Such a reaction shows the complexity of the Lubicon land struggle: even a related people can demonstrate an inability to appreciate the Lubicon way of life, including their working habits, and fail to recognize the Lubicon as the original inhabitants of the region. The battle is not just between the natives and powerful government forces or developers, but also affects another interest group, the Métis residents of the area.

In the meantime, the federal Indian Affairs Minister, David Crombie, agreed on 26 November 1984 that "it's time to make a deal"[51] with the Lubicon people. The band responded with a list of items it considered essential in the negotiating process: reserve lands amounting to at least 128 acres per person, as provided to those who originally signed Treaty No. 8; governmental acceptance of an extensive, joint genealogy study indicating that at least 347 Lubicon Lake people were entitled to land, with an additional 94 requiring further research; the right of band members to determine their own membership; full sub-surface rights in their reserve lands, as in the case with other reserves in Alberta; wildlife management rights over the band's traditional area, as the band has learned to "have absolutely no confidence" in the province to fulfill this function; responsibility for environmental protection over the band's traditional area; establishment of on-going services and programs for the Lubicon people as currently received by other native groups in Canada; a compensation program for trappers who have had their livelihood virtually destroyed by development; a system to ensure the accessibility of upcoming jobs from development projects in the band's traditional area to its members; a socio-economic package to include housing, community facilities, agricultural development, and vocational training; compensation for past and future losses to the band due to the exploitation of their traditonal lands; and reimbursement for the band's costs in their legal struggles.[52] The government studied the proposal.

While the Lubicon struggled with the federal government they also had to contend with its provincial counterparts in the political arena. Often the band was hit from both sides at the same time. For example, as the Lubicon had to justify the above claims to the federal level, intense pressure was put on them to acquiesce to provincial policy. When the province was unsuccessful in convincing band members to accept provincial jurisdiction over their traditional land, other arguments were used to disprove their aboriginal title. In one case government officials referred to the band's recent increase in welfare dependence as proof that the Lubicon did not have any traditional way of life worth saving. The more than 500 gas wells that sprang up in the Lubicon area in the early 1980s disturbed the fragile ecosystem upon which many residents depended to feed their families. With their traditional economy virtually destroyed, many were forced to seek social assistance, only to have this last resort used against them: "The resulting welfare rolls are then used as evidence that these same people no longer pursue a traditional way of life, and then to argue that they have therefore 'lost' their aboriginal land rights."[53]

Earlier in 1984, the Liberal Minister of Indian Affairs, John Munro, had also contacted the Alberta government in order to negotiate a settlement with the Lubicon Band. However, when members of the Alberta Legislature questioned Native Affairs Minister Milt Pahl about the impact of development in the Lubicon region, Pahl stated that his "crystal ball" was "a bit cloudy."[54] This was the Alberta government's response despite the fact that Munro's communication reminded Pahl of the urgency of the matter:

> Within the last few months, the band's situation had become progressively worse. As a result of encroachment of industrial development in the Lubicon region, the autumn (fur) harvest was negligible. The threat to the band's traditional way of life is even more pronounced. If this band is to survive as a group and is to preserve its identity, a reserve is urgently needed.... The governments of Canada and Alberta have the responsibility to ensure that every conscientious effort is made to relieve the band's suffering. At the very least, we should be motivated by a sense of social justice.[55]

The Lubicon feel that government indifference over the years, compounded with government-approved encroachment on their traditional land, has resulted in anything but "social justice." In addition to the economic erosion suffered by the community, the social fabric has also shown signs of wearing thin and is declining fast. As the skills of old hunters and trappers are needed less (for there are fewer opportunities to partake in those activities), the elders are disregarded by the younger generation. The latter no longer seek advice from the voice of experience for something that is becoming obsolete, while the former lose their place of honour of days gone by:

> Seven years ago these kids lived in a quiet, stable, traditional Indian community which had changed little for generations. They looked to their parents and the Elders of their community for advice

> and information on how to hunt, how to trap, how to relate to one another, how to deal with birth and death, how to raise children, how to handle illness and generally how to live and be a responsible person....
> In the midst of all of this social upheaval and disruption and dislocation, their world in turmoil, everything they'd traditionally known and trusted and relied upon turned upside down and inside out, the young people of Lubicon Lake have become increasingly restive, less inclined to listen to their parents and Elders and community leaders, more inclined to strike out on their own, carousing all night with their friends....[56]

There is a growing fear that the oil-related destruction in the area is reaching an even deeper level than the Lubicon pocket book - it is seeping into the very soul of the people:

> The changes amount to more than a tragedy for one old trapper; they are the beginning of a breakdown in the entire social structure.
>
> It is difficult to gauge to what degree the community now suffers materially and psychologically.... The destruction wrought by newcomers is too recent to have sunk into the collective psyche. But there is a sense of impending disaster, a sense that the community, its economic and social base cut from under it, is about to crash.[57]

As the Lubicon's troubles mounted, so did their casualties. Whether it was a case of an 80-year-old trapper who had to settle for baloney because all he could catch was a few squirrels, or the situation with the restless youth racing down the newly-constructed highways into fatal collisions,[58] the result was the same: a sense of loss - loss of a livelihood, of community cohesion, of a spiritual bond with nature and all living things. In essence, the eradication of a traditional way of life for the Lubicon ushered in an array of complex problems which the band had few resources to combat:

> Problems are beginning to show in statistics. Drinking appears to be on the rise, and welfare payments are up. In November 1983, welfare to the settlement totalled $9,251 - going mostly to infirm people and single parents. A year later, payments doubled to $18,455.50. Oil companies prefer to hire experienced workers from southern Alberta, and some men in Little Buffalo are reluctant to work for the oil companies anyway: the men cannot live by trapping because the land is being ripped up, but they do not want work that helps to rip up the land.[59]

Perhaps the most difficult problem for observers to conceptualize is the extent of change that engulfed the Lubicon community within the last decade. Indeed, the transformation was all the more devastating because it occurred within a short period. The Lubicon enjoyed a distinctive native way of life up to the 1970s. They were undaunted by their lack of twentieth century technological innovations and so-called material improvements. As recently as 1978 the Lubicon Lake people had no telephones, electricity, indoor plumbing, newspapers, or television; in 1982 their children were still driven to school in a horse-drawn wagon. The Lubicon "considered themselves lucky as a people and felt genuinely sorry for others on the outside whom they considered less fortunate."[60] Given this ideological stance, one might better understand the band's preoccupation with obtaining a reserve. Indeed, Chief Ominayak stated in 1986 that though his people were entitled to a compensation package, the money issue was negotiable; the land was not. "Land is the No. 1 item"[61] because it is the base from which the Lubicon sustain their livelihood and their identity. To take away their land was to remove a vital substance from their lives.

David Crombie responded to the proposal put forth by the Lubicon in late 1984 by appointing a former judge to conduct a study of the situation. "I'm appointing a special representative to give the matter the time and attention it needs and to find out what's good for the band."[62] E. Davie Fulton, former minister in the John Diefenbaker cabinet, and former justice of the Supreme Court of British Columbia, arrived at the Lubicon site on 9 April 1985. He witnessed first hand the extent of fire damage: "641 square miles of bush destroyed in the first three years of the oil boom," and he underwent what he called "a sort of evolution."[63] Fulton's first draft was submitted to Crombie in December, 1985, and at first Crombie replied that negotiations would proceed "Full steam ahead."[64] At the same time, however, Alberta Minister responsible for Native Affairs, Milt Pahl, announced in a news release that in accordance with federal approval, Alberta was offering the Lubicon 25.4 square miles of land as set aside by the province back in 1949, but on condition that "the Band withdraw its litigation against Alberta."[65] The band rejected any deal that included conditions, while the federal government denied having agreed with the province to the condition of dropping all lawsuits.[66] The final Fulton Report, which was supportive of most of the Lubicon's claims and aspirations, was submitted to David Crombie in February, 1986. The updated report was never made public nor responded to by government officials.[67] Crombie was named secretary of state and minister of multiculturalism in April, 1986. His successor at native affairs, Bill McKnight, named a new investigator for the Lubicon case who began in October, 1986, by telling the Lubicon to "stop the nonsense," and by publicly stating that as far as he was concerned, "the legal owner of the disputed land [was] the province of Alberta."[68]

The main stumbling block at this point was still the question of membership. The Lubicon had one figure, the federal government had its own, and Alberta recognized neither. In summary, the three parties in this dispute held a position as follows, starting with that of the Lubicon:

> The Band should receive a Reserve at the Western end of Lubicon Lake to include the site agreed on in 1940, to consist of a total area calculated on a basis which would render to the Band no less than the allotment calculated in accordance with Treaty 8 based on a membership of at least 347 (as determined by joint Band-ONC Genealogical study). Historically, the basis of entitlement is numbers properly eligible for membership at the date of survey. On this basis the total number to be counted to establish actual entitlement according to today's criteria for eligibility is in excess of 400. This would entitle them to an area at least twice, and probably three times, as large as the 25.4 sq. mi. set aside in 1940....[69]

The position of Canada was that:

> The Band is entitled to a Reserve, which is to include the area at the western end of Lubicon Lake agreed to in 1940. The membership figure to be used to calculate the total area is to be the figure at date of survey - i.e. the present number. The starting figure for this purpose is 182 (present registered membership) to be increased to a number between 250 - 300 if the criteria as to eligibility for membership in the Indian Act prior to the 1985 changes ("the old Act") are applied, or between 350 - 400 if the provisions of the new Act are applied.[70]

The federal government had not yet decided on which criteria it would use to determine the final Lubicon count for the establishment of a reserve. In the meantime, Alberta contended that

> Subject to reservations as to protection of existing interests of third parties, Alberta raises no objection to location, or to entitlement in principle. Subject thereto, Alberta remains ready to honour the commitment of 1940, and to transfer the 25.4 sq. mi. at the western end of Lubicon Lakes as agreed in 1940 - which was on the basis of a Band membership of 127. Alberta awaits receipt of a validated claim and request for transfer from Canada accordingly; but if the claim and request put forward is based on a figure of Band membership in excess of 127, Alberta reserves the right to challenge that figure and the entire basis of calculation of 127 in 1940. Alberta claims to have information which shows that the number entitled to be counted in 1940 was considerably less than 127, and that the numbers so entitled today are very much lower than the figures put forward by the Band and discussed by Canada.[71]

While the two levels of government disputed the membership criteria, and ignored the recommendations of the Fulton Report, the Lubicon Lake Band attempted to deal with their situation on their own. They effectively stopped some developers from entering their territory and even evicted others who "snuck in through the back door," maintaining that "we're acting under our own lawful authority, which is the only lawful authority in our area."[72] Aware that they were physically incapable of patrolling their entire region, the Lubicon did not oppose most development projects, demanding only that the band be consulted prior to commencement of operations. They were especially concerned with ensuring protection of particularly sensitive areas, including their nineteen different burial grounds and the proposed reserve location. When the band was confronted with government and oil company non-compliance with this stipulation, the Lubicon replied in daring style. As far as the Lubicon were concerned, they owned the land. They argued that because they never signed Treaty No. 8, their traditional land base was never ceded to the federal government, and therefore could not have been transferred to the province in 1930. The proper cession will take place only when a reserve is set up, an agreement that must be made between the Canadian government and the Lubicon:

> Friday, January 09, 1987, a spokesman for the Alberta Attorney General told reporters that it would be "illegal" for the Lubicon Lake people to evict development company workers who'd been given Provincial Government permission to enter and bulldoze our traditional lands. That's a curious idea in light of the fact that it's our land which is being systematically destroyed by such development activity. It doesn't belong to the Alberta Provincial Government, and the Alberta

> Provincial Government has no right authorizing anybody to enter and bulldoze it. Moreover Provincial Government laws clearly don't apply to lands which are not Provincial Government jurisdiction.
> The Alberta Provincial Government's claim to our traditional area comes about as the result of supposedly receiving those lands from the Canadian Federal Government in 1930. The Canadian Federal Government in turn supposedly obtained rights to those same lands from the Indians in the area, through negotiation of a treaty in 1899. However nobody ever negotiated a treaty with us, and we never ceded our traditional lands to anybody. It has therefore never been within the power of the Canadian Federal Government to transfer our lands to the Alberta Provincial Government.
> Our aboriginal rights to our traditional area are thus intact. But while we've tried to obtain recognition of those rights through the Canadian courts and the Canadian political process, much of what we have and value as a people has been destroyed by the type of development activity which we are now determined to block, and which we must block if there's to be anything left to talk about.[73]

At the same time the Lubicon were involved in another publicity campaign to force the government to come to terms with the band's demands. Since April, 1986, the band had started a boycott of the 1988 Winter Olympic Games to be held in Calgary. From the band's point of view, one of the most ironic and even hypocritical aspects of the Winter Olympics was the proposed native art display, entitled "Forget Not My Work," to be exhibited at the Glenbow Museum. In a press statement released by the exhibition's corporate sponsor, Shell Canada, the public was told that "The exhibition of these treasures is an important event for Canadians and for visitors to Canada. It will give us all a chance to expand our understanding of Canadian Native heritage.... Shell's participation in this project is consistent with our commitment to Canada."[74] Shell contributed $1.1 million toward the exhibition, while it also operated a $130 million tar sands plant in the Lubicon claimed traditional territory. The band felt that it was hypocritical for the Games to glorify native cultures when the host province would not negotiate with the long-standing Lubicon case. Many critics agreed with the Lubicon's questions. "It's an astounding story of injustice and despair, of David against Goliath."[75]

In addition to asking the public to boycott the Winter Olympics, the Lubicon wrote to museums around the world asking them not to participate in the Glenbow exhibition. The arts exhibit was supposed to be an international event with displays from all the major native art collections internationally. By 31 January 1987, however, eleven major museums had officially refused to participate in support of the Lubicon claim, withdrawing approximately 200 artifacts from the show.[76] In November, 1986, Joan Ryan, anthropologist and committee member of the exhibition board, resigned in protest against Glenbow Directors having put diplomatic pressure on foreign museums to participate. She explained that she did not want to be a part of any "group which furthers its own interest by adding to the oppression of minorities."[77] The exhibition went ahead as planned, so-to-speak, but not without its hanging cloud overhead. The Lubicon succeed in acquiring much publicity for their cause, and the controversy led to a Museum Code of Ethics being passed on 4 November 1986 by the General Assembly of Museums, in Buenos Aires, stipulating that "ethnic artifacts should not be used against the ethnic groups who produced them."[78] The name of the Glenbow exhibition was also changed to "The Spirit Sings."

Following the completion of the 1988 Winter Olympics in Calgary, the federal government took the offensive by suing the Lubicon Lake Band, asking the court to impose an immediate settlement on the band. In the fall of that year, the band responded by withdrawing from all legal actions declaring that Canadian courts had no jurisdiction on Lubicon territory. Lubicon Lake Band land was not in Canada.

The band claims that this had always been their position. They had initially approached Canadian courts in order to get Canadian governments to obey Canadian laws. The Lubicon were willing to go through the process of seeking an agreement with the federal government, but they were not prepared to submit to laws and regulations that were created by others and which might contravene the rights of the Lubicon people. The band never considered that decisions by Canadian courts were binding on the Lubicon; the band retained the option of veto, much as nations do in international courts.

In Lubicon land, only Lubicon laws applied.

On 15 October 1988, the Lubicon people intensified the patrol of their borders. Blockades were set up and anyone wishing to enter Lubicon territory had to visit the check points and obey Lubicon laws. People came from across Canada to assist the Lubicon Lake people. At 6:30 a.m., 20 October, the provincial government invaded this short-lived independent nation. The RCMP forces had sub-machine guns, sniper rifles, attack dogs, and helicopters flying overhead. Twenty seven people were arrested but later released. On that same day, the Lubicon received some support from a most unlikely source. The Alberta Premier called Chief Ominayak to set up a meeting. Two days later, the province and the Lubicon reached an agreement.[79] But it, too, has become entangled in red tape.

Had the band only been obliged to deal with one level of government, they might have secured a home a long time ago. Traditionally, the provincial government was the most reluctant to acknowledge the band's claim because of pressures from oil developers. The federal government is constitutionally responsible for land claims but it could not proceed without a land transfer from the province. Now that the province settled with the Lubicon, Ottawa had only to act on the proposal. But the fall of 1988 was also the time of a federal election and other, more pressing business called the attention of the government. When the Lubicon planned to stage demonstrations across the country at every point the electioneering Prime Minister stopped, officials from Ottawa agreed to proceed with negotiations. Soon after the election, on 24 January 1989, talks broke down with Ottawa, federal officials declaring that the Lubicon-Alberta agreement was unacceptable, and that the band was "greedy not needy."[80]

Following the break up of talks between the federal government and the Lubicon, both sides in the conflict blamed the other for the collapse in the negotiation process. The one area that the two sides appeared to agree upon was that a major stumbling block was the issue of compensation. According to government reports, Ottawa was ready to accept the membership list provided by the Lubicon, and subsequently offered a 95 sq. mile reserve plus $45 million to assist the band to build a community. The band, however, indicated that they tabled a compensation package of $167 million, but that the figure was negotiable. The government would have nothing to do with the idea of compensation:

> If you go back in history, the Chief said that land was the big issue. We solved that. They would get the reserve they negotiated with Premier [Don] Getty. The Chief said membership and fair and equal treatment for his people was then the big issue. And we solved that. And we offered a total of $45 million which would have created a community they could have been proud of, and it would have funded a transition economy, if you will, to help them make the transition from a traditional life of hunting and trapping into a more modern economy....
> Well, they've not only rejected that. We recognized in making them the offer that we were far apart on money. They believe that Canada still owes them, or should pay compensation - the number the Chief just used was $104 million. The number that was put forward in the negotiations was a number somewhere in the range of between $114 and $275 million. We

> recognize that we could never reach agreement on the compensation, because Canada believes it does not owe any compensation whatsoever. So we offered to go ahead with the $45 million settlement, to create the reserve, to build the community, to start funding the transition to a new economy, and still leave them the right to sue us in court for the other $104 or $275 million or whatever their number is.[81]

The fight continued. The Lubicon proceeded with their mandate and released the Treaty of North American Aboriginal Nations, a document modeled after other international treaties, such as NATO or NORAD. This mutual defense pact will ensure that if the Lubicon are ever invaded by outside forces, other native groups who have signed the Treaty will come to their support.

Major newspapers across Canada have also assailed the government's inaction in redressing a case of historical injustice that drags on to the present. Some commentators suggested that the Lubicon dispute was typical of the ill treatment endured by most native Canadians: "In a way, it is just a routine case of the looting and deceit inflicted on native people by Canadian governments for a century."[82] Others referred to the potential high cost for governments in settling with the Lubicon, but insisted that it was "the price of justice and, whatever it amounts to, it must and will be paid."[83] Still others pointed to the "state of legal limbo" in which the Lubicon were put, and questioned whether it was "possible that more people are harmed by government's inability to make a decision than by their leaders' wrong moves."[84] Some bluntly proposed that "If a scrap of decency exists in Ottawa and Edmonton, the just settlement will be sought immediately."[85]

d. Society versus culture:

Government handling of the band's concerns has been consistent with Canadian reaction to and treatment of its native population in general. There has been little effort to accommodate the aboriginal needs in face of white goals. An analysis of the events surrounding the Lubicon struggle reveals a relentless trend that began with first contact in the Americas and persists to the present. For the past 500 years, the indigenous people have been nullified.

Explorers in the fifteenth and sixteenth centuries had papal bulls and royal grants to support their territorial claims over those of the original inhabitants of the New World. Likewise, David Laird approached the Peace region in the late nineteenth century with a document that informed the local residents of their tenant status. Although he offered the native peoples a treaty, he formally stated that "The Queen owns the country." Like his precedessors, Laird did not request permission for white penetration of the area, but rather told the incredulous natives "What is required of you." One of the groups missed during that initial treaty "negotiation," the Lubicon Lake Cree Band, had the audacity to tell government officials what was required of them in order that Lubicon territory be used for white development. Authorities could only react defensively for the Lubicon stand contradicted the very essense of the Canadian federation: European pre-eminence. When the government met the band on 24 January 1989 federal officials already had a prepared press statement before discussions began.[86]

In reviewing the government record relating to Canada's indigenous peoples, it is only too easy and tempting to condemn the former and defend the latter. It might even be argued that the lack of universal and comprehensive advocacy for the native cause is due to a general public ignorance of the facts. But facts, too, can be interpreted subjectively. It should not come as a surprise, therefore, that for every citation showing an inconsiderate official utterance, there can be found at least one counter statement reflecting the complexity of the issue. To insinuate that every government move, from colonial times to the present, has been to destroy the native presence would not only be incorrect but would serve no useful purpose. This is true of the native land question in general and of the Lubicon struggle in particular. There is little doubt that development and settlement have greatly disrupted the native way of life, but results are not always indicative of conscious efforts. Furthermore, one must take into account the difference between an ideology shared by a group of people at a certain time, and a vindictive tendency exemplified by some individuals of that group. Hence, the Europeans of the fifteenth and sixteenth centuries truly believed that they had a right to the "discovered" lands, much as the Mexica believed that human sacrifice was essential for the functioning of the cosmos. It is simplistic to charge these beliefs as being idiotic or cruel; the actions to which they gave rise should be seen in context.

In the Canadian scene, as in many others, the power brokers dictated the norms and values of the incoming society. As the numbers of white settlers increased, the indigenous population was marginalized in the great push forward that typified the frontier mentality. The situation of native peoples in modern Canadian society is thus an unfortunate consequence of historical events, and not necessarily proof of a malicious plot. It has also been argued that Canada's aboriginal peoples have been subjected to a common occurrence in the history of nations - the advent of migrations and shifts in territorial acquisitions.[87] Admittedly, this argument can be dangerous, for it can be used to justify any action as historically necessary in the social evolution of humankind.

There is ample documentation showing mismanagement of native affairs in Canadian history. However, as discussed earlier, cultural misunderstandings played a big role. From the first influx of settlers, expediency was evident in the handling of the native population, but not all authorities were indifferent to the situation. Native pleas and protests were lost in the clamour of increased settlement and development which the incoming Europeans believed to be necessary and beneficial. In the face of opposing realities and values, the dominant society took precedence, and "authorities viewed the situation with mixed feelings and uncertain loyalties."[88] On the one hand, there were the needs of the aborigines; on the other, the urgent call for "progress" by the white settlers. Submission to one group appeared to contravene the goals of the other, and this dilemma continues to plague the Canadian government today.

Expediency played its part in the history of Canadian relations with the native peoples, and if there were immediate advantages to be gained, they would certainly not be in favour of the native.[89] Decision makers belonged to the dominant group, and in the battle between opposing loyalties, blood proved thicker than water. Oversights were not always due to misconduct, however, but might also be attributed to misguided efforts and to a "lack of expertise, not intent."[90] Neither side had any clear understanding of the other, and it should not come as a surprise that prejudices surfaced in the dealings between the various and opposing interests. Furthermore, cultural differences aside, other factors determined or influenced the extent and degree of conflict between the white and native societies. In western Canada, for example, railway construction in the 1880s led to further upheavals for some native groups because their way of life was threatened by a change of players: "Within ten years the West had passed from the influence of a company whose primary concern was the fur trade to that of a company whose major interests centred on settlement and development."[91] Correspondingly, in preparation for the new economic and political reality, the government set out to sign agreements with the aboriginal peoples, but the expedient nature of the treaties of the 1870s was not necessarily an example of underhanded practices. Instead, the dubious negotiations might reflect "the haste with which the Dominion was stitched together and should not be taken to imply that government's motive was to steal Indian land or to obtain it by trick or fraud."[92]

There were certainly cases of questionable dealings and even misrepresentation during some treaty ceremonies, as has been shown. Government motives were also not always honourable - in fact, officials often acted to protect non-native interests. Again, when faced with seemingly opposing needs, leaders were prone to support that which made sense to them. The cross-Canada railway, for example, was seen by politicians as an absolute necessity for national unity and economic growth. Some of them might have been aware that construction of the railroad meant great disruptions for native groups across the country, but officials also believed that aboriginal people were properly compensated with a reserve. This does not justifiy the situation, but it helps to explain it. Furthermore, there were those in high office who openly criticized the price some indigenous people had to pay for the sake of the Dominion. For example, Superintendent General of Indian Affairs, David Laird, publicly stated in 1874 that the Terms of Union which brought British Columbia into Confederation in 1871 were "little short of a mockery of (Indian) claims."[93] Federal Commissioner Gilbert Malcolm Sproat (1834-1913) was convinced that "...no government of the province will effectively recognize that the Indians have any rights to land. If it is possible to deprive them of their land, or to prevent them getting a bit of land, it will be done."[94]

Similarly, evidence shows that not all employees of the Department of Indian Affairs were uncaring bureaucrats insensitive toward those they served. Records show that some native cries were heard and needs attended to. During the starvation years of the Depression, for instance, the department gave children at one reserve school "a daily lunch of bread, butter, tinned tomatoes, peanut better and fresh milk."[95] Also during the hungry '30s, a young native boy was shot accidentantly at Fort George, and no transportation was available to take him to a doctor. An Indian Agent contacted an officer of the Royal Canadian Air Force who flew 1000 miles to take the boy to Ottawa, which saved the patient's life.[96] DIAND reports also show some awareness of the native culture and an appreciation for the aboriginal "conservationist" tradition.[97] One report even stated that one of the principal factors for the depletion of game in native territory was "over intensive trapping due to the encroachment of white trappers on the trapping grounds of the Indians."[98]

There were even examples of DIAND standing up for the native interest. In regard to the aforementioned Soldier Settlement Acts, for example, DIAND was asked by the government to surrender the reserves of Duncan's Band and of the Beaver Band of Dunvegan in the fertile Peace River district. The department refused and only succumbed to pressure in 1928.[99] Sometimes when government actions limited native hunting rights, DIAND tried to offer some protection to the native people by purchasing some exclusive trapping areas from white trappers.[100] Oftentimes DIAND was limited in its work by outside pressure, as in the case of allocating a reserve for the Sawridge Band in 1911. Department efforts were squashed by vocal protests from settlers who felt that the "good agricultural land" should be left open for settlement.[101] The department which attempted to support native rights was often in conflict with incoming settlers who were represented by the Department of the Interior.

The Lubicon, too, have not been without their support in the political arena. Without minimizing the band's frustrating experience, it should be noted that some officials have publicly stated their outrage about the Lubicon situation. On 10 October 1985, a Liberal member of parliament, Keith Penner, demanded in the House of Commons that the government commit itself to helping the Lubicon people which "today [is] facing a real possibility of extinction." The Minister of Indian Affairs, David Crombie, responded that

> ...the Hon. Member is quite right, the Lubicon Lake matter has been a running sore in this country for 45 years. I have had it under my own advisement and have been attempting to do something about it for the last three months. I expect that we will have a positive statement; I certainly hope so.[102]

On 22 October 1985 Jim Manly, New Democrat Member of Parliament, inquired: "When is the federal government going to give justice to the Indian people at Lubicon Lake, acting on its own negotiator's recommendations, instead of trying to slough this problem off, waiting for it to resolve itself?" Deputy Prime Minister Erik Nielsen responded that the Minister of Indian Affairs was out just that moment dealing with a similar problem.[103] On 14 April 1986 Penner again reminded the government of the "devastating consequences" faced by the Lubicon people and that their "way of life [was] being systematically destroyed by oil development." Jake Epp, Minister of Health and Welfare, later stated that the Minister of Indian Affairs had made the Lubicon case "a personal issue which he wants to resolve."[104]

It is fair to conclude that many politicians and well-intentioned officials have tried to resolve the Lubicon situation, but their vision was intrinsically different from the band's. This might explain why, despite the numerous meetings between the parties, no agreement has been reached. The Lubicon have not been ignored for fifty years, they have been misunderstood, and it is questionable which phenomenon is most damaging. Nor has the misunderstanding been totally one-sided. The most recent break in talks revealed a persistent block in comprehension that was mutual among the major players. The federal government contended that its offer was fair because it was "consistent with other recent settlements with native groups."[105] The Lubicon argued that the government sought to discredit the band because they were "serving as an inspiration to other aboriginal people in Canada."[106] The government stated that "consensus was reached among government and band negotiators on key issues of membership, reserve size, community construction and delivery of programs and services," and that the only area of disagreement was "on the issue of cash compensation."[107] The band replied that "compensation is not the only unresolved issue. In fact there's no agreement on reserve land, no agreement on membership, no agreement on community construction costs...."[108] Ottawa claimed that "we have offered a settlement totalling $45 million,"[109] but the Lubicon reiterated that "the Federal offer doesn't amount to 45 million dollars."[110] Government negotiators insisted that the Lubicon could proceed with the present offer "without prejudice"[111] to any future claim, but the band referred to a "full and final release of all Lubicon land rights"[112] included in the government offer.

Given the unsuccessful round of talks with government officials, the Lubicon approached the United Nations, for they felt that "the Lubicon people have no hope of achieving effective redress within Canada, and are therefore dependent upon the world community for protection of their rights and their survival as a people."[113] The federal government, however, submitted a request to the United Nations asking that the Lubicon communication "should be declared inadmissible" because "effective domestic remedies have not been exhausted."[114] Predictably, the Lubicon were accused of walking off the negotiating table, while the band held the government responsible for the collapse of talks because of its inflexible "take-it-or-leave-it" offer. It appears that the two sides had difficulty not only talking but even listening to each other.

The gap between the two sides widened with every public statement. The Lubicon called the government aide, Ken Colby, a "professional propagandist" employed by Ottawa "to generate contrived and inaccurate stories,"[115] while the band's lawyers were viewed in turn as "mercenaries."[116] Some critics contended that the Lubicon wanted "cash for life,"[117] and that their "wish list is beyond belief."[118] The band, however, argued that the government and developers had "taken billions of dollars in resources from our lands. These are our resources. We're not asking for taxpayer's money."[119] The government insisted that Ottawa "cannot be cowed, and will not be cowed, by anarchy,"[120] but the band promised that "We're not going to sit back for another 48 years to wait for the Federal Government to make a move,"[121] although "we're not going to go begging to anybody."[122] On 26 January 1989, one Edmonton newspaper ran a headline referring to the Lubicon's "greed not need" stand while another focused on the band's claim that "We only want to avoid Welfare." A government spokesperson commented that "I think somewhere in the middle of those headlines is probably reality."[123] The statement might have lacked depth or genuine commitment, but it reflected a refreshing change from the cacophony of counter accusations. Maybe someone was starting to listen.

The conflict between the Lubicon and the federal government will not go away on its own accord, and until it is resolved the band is deprived of yet another essential element in their lives: dignity. Although both sides might be guilty of prolonging the misery to some degree, only one group bears the destructive outcome of the impasse. Governments come and go, and some even get re-elected, but in any event they have not been directly affected; for the Lubicon, it will take an enormous effort to rebuild the social structure of their community. Their community cohesiveness has been their greatest loss and it is intricately related to the land issue:

> People subjected to welfare for eight years, it takes a lot out of people and that can't be resolved overnight.... Our people survived off our lands for years. To see the destruction right before your eyes hurts in many ways. They [the developers] have no concern for leaving the environment as intact as possible. This concept was very clear from the start. They view land and resources as something you extract without concern or even thinking of people living on it after that.[124]

In the end it is the Lubicon who are left agonizing over the prospect of their uncertain future. Developers continue to rip through the band's traditional land much as the early explorers cut through the forests of the New World. The devastation of the environment repeats itself and the same arguments are used to justify it. Early settlers contended that they had a right to profit from the native territory because the aborigines were not using it properly; modern judges state that any potential damage to the environment (or to a native way of life) can be compensated with money. According to these views, natives are still not using the land properly. Furthermore, whatever their interests might be, aboriginals can be placated, but the loss of profits if development were to be curbed would be irreparable. Aboriginal complaints and arguments regarding their sovereignty were largely dismissed in the early colonial period. Likewise, Lubicon evidence for their position was questioned by judges and the Alberta Ombudsman. The idea of respecting the native oral tradition was not seriously considered by the first Europeans in the continent, and it is still disparaged by the modern world. As the Lubicon Band learned from their numerous court battles, when up against the sophisticated techniques of the multi-nationals and governments, "the evidence of Elders as to the way of life of their extended family and community is insufficient or inadequate."[125]

Perhaps the strangest aspect of the Lubicon struggle is the argument that the band has no right at all to their territory. The Alberta government called them "squatters," an attitude that was reflected by an individual who leases Lubicon land who suggested that they go back to where they belong. One can only wonder where that might be. Still, similar arguments were used in the early nineteenth century by critics of native accommodation in Nova Scotia, for example. "'An Indian never can be cured of the wandering habit' and the best thing that this 'useless, idle, filthy race' could do for the province was to leave it."[126] To Europe, perhaps?

These sentiments betrayed a repugnance for a people who did not fall into any accepted category. Europeans had a tendency, from first contact onward, to try to mould the aborigine into something they considered comprehensible.[127] The general approach was to help them by changing them, even to the extent of teaching "natives to be natives."[128] The

Lubicon, however, did not fit into "the little boxes they set up." Contemporary officials echoed views that were articulated throughout Canada's history, for "In each colony... the ideal Indian was the invisible one."[129] Indeed, immigration calls for more settlers in the nineteenth century insisted that the natives "were inoffensive and diminishing yearly.... Now we seldom see a Moose or an Indian."[130] Like the disappearing moose, the demise of the native population was considered normal, a position that was "scientifically" supported by the doctrine of the survival of the fittest. Some white settlers even believed that it was a simple matter of killing the native or being killed.[131]

Modern critics might not be so openly blunt, but their tactics might be as dangerous. The sufferings inflicted on the Lubicon Band, for example, might be regarded as an insiduous death sentence on a people. A judge questioned the existence of their distinctive way of life, implying that they must have always depended on welfare payments for subsistence.[132] Government records show otherwise. At the crux of this tenacious official stand is an inability to accept the possibility that native people could do very well without European know-how. White society has always had serious difficulty coming to terms with the fact that its "expertise" could actually be deemed unnecessary. The idea was especially insulting if the rejection came from a marginal group:

> The fact that Indians did not gladly embrace the white's superior way of life was bad enough; that they persevered in their own was even worse.[133]

The native persistence with its own customs was adverse to white economic aims. A sneer at a cultural trait might be overlooked, but an obstacle to financial profits must be eradicated. Thus, the Potlatch Dance was allowed to make a comeback, but the native concept of land usage could never regain a foothold. The question of land was not negotiable. Natives were to come to their senses or die.[134] When it came to the land, Europeans had only one thing to say about the aboriginal people: "They must yield or perish."[135]

To the irritated consternation of such claimants, some indigenous people refused to do either of the above. The Lubicon, for instance, were bypassed in 1899 but have fought ever since for a recognition they insist is their due. Nor does their fight appear to be weakening. Although their people have endured immeasurable hardships, they have refused to be intimidated. Like the perennial dandelion, it might be that every attempt to nip the Lubicon at the bud has lead to a persistent rejuvenation of the band's roots. Like all living things, however, Lubicon roots need some land in order to survive.

ENDNOTES

[1] Goddard, "Double-Crossing," 6.

[2] Ibid.

[3] Ibid., 3.

[4] Matthew Fisher, "Quiet persistence hallmark of hero," The Globe and Mail, Saturday, 29 October 1988.

[5] Ibid.

[6] Ibid.

[7] Sean Darkan, "The Battle of Little Buffalo," The Edmonton Sunday Sun, 23 October 1988.

[8] For example, following the break-up of talks with the federal government in January, 1989, the federal government announced that some band members were willing to deal with the government on their own. This apparent split within the band and threat to the leadership was seemingly resolved on 31 May 1989 when Chief Ominayak was unanimously reelected. Two months later, however, the federal government agreed to recognize a new band in the region. See The Edmonton Journal, 27 July 1989.

[9] Fisher, "Quiet persistance."

[10] Alberta Hansard, 13 April 1981, 162.

[11] Ibid., 29 April 1981, 406.

[12] Lubicon, "Standing Committee," 16-18.

[13] Alberta Hansard, 29 April 1981, 406.

[14] Ibid., 407.

[15] Ibid., 406.

[16] Ibid., 408.

[17] Ibid., 407.

[18] Lubicon, "Statement," 24 November 1983, 2.

[19] Ibid., 4.

[20] Ibid.

[21] Reasons for Judgement of the Honourable Mr. Justice Forsyth, copy of the judgement, No. 8201-03713, Lubicon Lake Band records, 9-10.

[22] Ibid., 12-13.

[23] The Toronto Star, 30 January 1984.

[24] Statements made by James O'Reilley, legal counsel for the Lubicon Lake Band, as cited in The Toronto Star, 30 January 1984. See also, O'Reilley's presentation during Judge Forsyth's hearing on the matter of costs. Proceedings, Court of Queen's Bench of Alberta, Judicial District of Calgary, No. 8201-03713, pp. 18-19.

[25] Lubicon, "Statement," 6 February 1985, 1.

[26] Ibid., 2.

[27] Ibid., 2-3.

[28] Ibid., 15.

[29] Proceedings, Court of Appeal of Alberta, Calgary Civil Sittings, Special hearings for 7-10 January, 1985, 16057, 15-66. Emphasis on copy - added by Lubicon.

[30] As cited in Lubicon, "Standing Committee," 16.

[31] Ibid., 20.

[32] Ibid., 23.

[33] Ibid., 24.

[34] Ibid.

[35] Dr. Anwar M. Barkat, Letter from the Director of the Programme to Combat Racism, World Council of Churches, to the Rt. Honourable Pierre Trudeau, October 1983, 3. A copy of this letter is found in the above-cited Boreal Institute Collection (Note 8, chapter 3).

[36] Ibid., 6.

[37] Archbishop Ted Scott et al., "Statement by Church Leaders on the Recent Fact-Finding Trip to the Lubicon Lake Indian Band," Edmonton, 29 March, 1984, 1. A copy of this statement is found in the above-cited Boreal Institute Collection (Note 8, chapter 3).

[38] Canada, Indian Self-Government: Report of the Special

Committee, chaired by Keith Penner (Ottawa: Supply and Services Canada, 1983), 112.

[39] Alberta, Special Report of the Ombudsman for Alberta Re: Complaints of the Lubicon Lake Band, August 1984, Province of Alberta, 16, 21.

[40] Ibid., 15, 22.

[41] Ibid., 55.

[42] Douglas Martin, "Caught Up in an Oil Rush, a Canadian Tribe Reels," The New York Times, 5 June 1984.

[43] Ibid.

[44] Alberta Hansard, 15 April 1985, 365.

[45] Ibid., 364, 365.

[46] Ibid., 18 April 1985, 460.

[47] Ibid., 459.

[48] Judy Steed, "The last stand of the Lubicon," The Globe and Mail, 7 April 1984.

[49] Editorial, "The helpless abused," The Globe and Mail, 7 April 1984.

[50] Steed, "The last stand."

[51] Lubicon, "Statement," 6 December 1984, 1.

[52] Ibid., 1-6.

[53] Lubicon, "Statement," 10 December 1984, 4.

[54] Alberta Hansard, 28 May 1984, 1087.

[55] As cited in John Goddard, "Last Stand of the Lubicon: With no reserve and no rights, small band of northern Alberta Indians battles for its ancestral home," Equinox, no. 21 (May/June 1985), 74.

[56] Lubicon, "Statement," 13 August 1985, 1-2.

[57] Goddard, "Last Stand of the Lubicon," 75.

[58] On Sunday, 11 August 1985, six Lubicon youths died in a head-on collision with an oil truck near Cadotte Lake. This tragedy followed three other serious auto accidents among the

Lubicon community in the previous three weeks. See Lubicon, "Statement," 13 August 1985; see also the report on The Edmonton Journal, 12 August 1985.

[59] Goddard, "Last Stand of the Lubicon," 75. While only the Lubicon old and infirm received welfare assistance in the early 1980s, approximately 95 percent of the band is now on welfare. This is a familiar process that many bands have experienced. For a general view of Canadian natives on social assistance, see N.H. Lithwick et al., An Overview of Registered Indian Conditions in Canada (Ottawa: DIAND, 1986); Frideres, "Native People," in Racial Oppression in Canada, edited by S. Singh Bolaria and Peter S. Li, (Toronto: Garamond Press, 1985); Rae Corelli et al., "Special Report: a Canadian Tragedy," Maclean's 99, no. 28 (14 July 1986), 12-27. For an analysis of conditions affecting a particular band, see Paul Driben and Robert S. Trudeau, When Freedom is Lost: The Dark Side of the Relationship between Government and the Fort Hope Band (Toronto: University of Toronto Press, 1983).

[60] Lubicon, "Statement," 13 August 1985, 1.

[61] Karen Booth, "Money's not issue - chief," The Edmonton Journal, 1 April 1986.

[62] Goddard, "Last Stand of the Lubicon," 77.

[63] Goddard, "Double-Crossing," 4.

[64] Ibid., 8.

[65] Alberta, "Government of Alberta News Release," 10 December 1985, 1.

[66] Douglas Goold and Karen Booth, "Ottawa asks Pahl to alter Lubicon offer," The Edmonton Journal, 19 December 1985.

[67] Reporters were able to disclose its contents only after having obtained copies through the Freedom of Information Act. See Gillian Sniatynski, "Lubicon disputes, discussions, drag on," The United Church Observer, March 1987.

[68] Goddard, "Double-Crossing," 8.

[69] E. Davis Fulton, Lubicon Lake Indian Band - Inquiry Discussion Paper (Ottawa: DIAND, 1986), 2.

[70] Ibid., 3.

[71] Ibid., 4.

[72] Karen Booth, "Within rights to evict crews - Lubicon Chief," The Edmonton Journal, 14 January 1987.

[73] Lubicon, "Press Statement by Bernard Ominayak, Chief, Lubicon Lake Band," 12 January 1987.

[74] As cited in Windspeaker, 2 May 1986.

[75] Calgary Herald, 24 May 1986.

[76] Edmonton Journal, 3 October 1986 and 13 December 1986; Lubicon, "Statement," 9 December 1986, 22 January 1987, 26 January 1987.

[77] Edmonton Journal, 16 November 1986.

[78] Lubicon, "Statement," 26 January 1987.

[79] The province agreed to transfer 76 square miles to the Lubicon, with full surface and sub-surface rights, plus 19 square miles with only surface rights, but the province would not develop this area without band consent. This information was provided by Fred Lennarson, adviser for the Lubicon, during an interview on 21 June 1989.

[80] This was the opinion expressed by government public relations person, Ken Colby, to the news media.

[81] Ken Colby, spokesperson for the Department of Indian and Northern Affairs, interview on CBC Radio, "Edmonton A.M.," 25 January 1989, 7:50 a.m.

[82] Editorial, Ottawa Citizen, 2 April 1986.

[83] Editorial, Calgary Herald, 5 April 1986.

[84] Vicki Barnett, "Injustice to Lubicon Indians is national disgrace," Calgary Herald, 8 April 1986.

[85] Editorial, Globe and Mail, 7 April 1984.

[86] Lubicon, "Statement," 8 March 1989, 1.

[87] Asch, Home and Native Land: Aboriginal Rights and the Canadian Constitution (Toronto: Methuen, 1984), 31.

[88] George Brown and Ron Maguire, Indian Treaties in Historical Perspective (Ottawa: DIAND, 1979), 11.

[89] Ibid., 25.

[90] Ibid., 29.

[91] Ibid., 40.

[92] Ibid., 37.

[93] Richard C. Daniel, A History of Native Claims Processes in Canada, 1867-1979 (Ottawa: DIAND, 1980), 30.

[94] Ibid., 36.

[95] Canada, Annual Report of the Department of Indian Affairs for the year ended March 31, 1932 (Ottawa: Queen's Printer, 1933), 8.

[96] Ibid., 1930, 40.

[97] Ibid., 1936, 13.

[98] Ibid., 1939, 219.

[99] Madill, Treaty Research Report, 86.

[100] Ibid., 99.

[101] Ibid., 84.

[102] Canada Hansard, 9, 1985, p. 7552.

[103] Ibid., 7877.

[104] Ibid., 8, 1986, pp. 12181, 12192.

[105] Canada, "Further Submission of the Government of Canada in Respect of the Communication of Chief Bernard Ominayak and the Lubicon Lake Band to the Human Rights Committee," 2 February 1989, 4.

[106] Lubicon, "Statement," 8 March 1989, 2.

[107] Canada, "Communiqué," 24 January 1989, 1.

[108] Lubicon, "Statement," 8 March 1989, 3.

[109] Canada, "Statement by the Minister Re: Lubicon Lake Band Land Claim," 24 January 1989, 1.

[110] Lubicon, "Statement," 8 March 1989, 7.

[111] Canada, "Further Submission," 4.

[112] Lubicon, "Statement," 8 March 1989, 8.

[113] Ibid.

[114] Canada, "Further Submission," 5.

[115] Lubicon, "Statement," 28 January 1989.

[116] The Ottawa Citizen, 29 November 1988.

[117] The Edmonton Journal, 27 January 1989.

[118] The Edmonton Sun, 26 January 1989.

[119] CFRN News Radio, 12:00 noon, 25 January 1989, Interview with Chief Bernard Ominayak.

[120] CFRN News, 4:00, 25 January 1989, Interview with Ken Colby.

[121] CBC TV, "Midday" (12 noon), 25 January 1989, Interview with Chief Bernard Ominayak.

[122] CBC Radio, "Edmonton AM," 7:50, 25 January 1989, Interview with Chief Bernard Ominayak.

[123] CKUA News Radio, 5:15 p.m., 26 January 1989, Interview with Ken Colby.

[124] Chief Bernard Ominayak, personal interview, 28 June 1989.

[125] Lubicon, "Statement," 17 November 1983, 2.

[126] Upton, Micmacs and Colonists, 140. Indeed, a legislator in that province was unwilling to protect native lands from the lawless intrusion of white settlers for fears of "damaging his popularity" among the latter. Henderson, "Doctrine of Aboriginal Rights," 120.

[127] Upton, Micmacs and Colonists, 17.

[128] Brody, People's Land, 213.

[129] Upton, Micmacs and Colonists, 136.

[130] Ibid., 137.

[131] Brody, Maps and Dreams, 58.

[132] A popular view among many Canadians is to consider native cultures either "dead" or "dying." This perception helps to justify development activities by insisting that there is little left of a native traditional way of life to

be disrupted. See Michael Asch, "The Slavey Indians: The Relevance of Ethnohistory to Development," in Native Peoples: The Canadian Experience, edited by R. Bruce Morrison and C. Roderick Wilson (Toronto: McClelland and Stewart, 1986), 271-296.

[133] Upton, Micmacs and Colonists, 140.

[134] Lester, Aboriginal Land Rights, 3.

[135] Brody, Maps and Dreams, 58.

CHAPTER V

CONCLUSION

> Humaneness is civilization's finest quality.
> All the sciences and arts are worth nothing if
> they serve only to make us cruel and proud.[1]

Treaty No. 8 will soon celebrate its centennial. One of the groups the treaty commissioners missed back in 1899, the Lubicon Lake Cree Band, still do not have a reserve, or, most importantly, peace of mind. While they see their traditional land bulldozed for oil development, their community joins the welfare ranks, endures an outbreak of tuberculosis, and experiences the first ever case of suicide among their people.[2]

The Lubicon have not been without their supporters. Their claims were justified by the two first government agents who visited them in 1939; a judicial inquiry in 1944 favoured their position; a statement from Dr. Anwar Barkat, Director of the Program to Combat Racism, Geneva, criticized the Canadian government's record on the Lubicon in 1983; the Report of the Special Committee on Indian Self-Government (Penner Report) agreed in 1983 that conditions facing the Lubicon were critical; church leaders in Canada, led by Archbishop Ted Scott, publicly denounced the treatment accorded to the Lubicon in 1984; the government's Fulton Report of 1985-86 supported the Lubicon position in all critical areas; a Buffy Sainte-Marie concert sold out in Calgary on 23 October 1987 in support of the Lubicon; after studying the Lubicon case for three years, the United Nations Human Rights Committee concluded in 1987 "that the rights of the Lubicon Cree were being seriously abused;" the 4th European meeting of North American Indian Support Groups passed a resolution on 22 May 1988 to support the Lubicon Band.[3] Yet the Lubicon remain without a reserve.

The Lubicon Cree Band has dealt with numerous officials from the federal government and the provincial counterparts, parliamentary committees, government commissions and studies, federal and provincial negotiators and advisers, lawyers, various levels of courts, the United Nations, church groups, civil rights groups, museum curators, geneologists, anthropologists and historians, the media and the public at large. Still, the band has no reserve. Admittedly, the Lubicon could have had a reserve by now had they accepted the last offer from Ottawa. But the band insists on being compensated for what it considers to be irreparable damage to its way of life. As has been shown, governments, developers, and Canadian courts disagree with this assumption. The story of the Lubicon can be best analyzed and understood in terms of cultural parameters. Because of the inherent value differences between the native people and those largely representing the dominant society, mutual misunderstandings and incomprehension have remained largely unchanged, from at least the time of the St. Catharine's Milling case to the present situation of the Lubicon..

In the face of such enormous obstacles and incredible odds, what makes the Lubicon hang in? Why have they become a role model for native groups across Canada? On paper, the Lubicon have not achieved very much, at least not officially. The Lubicon Band has set a precedent because it has refused to give up. When all else failed, the Lubicon relied on their own sense of justice and fought on. Their response to Alberta's Land Tenure Program was exemplary of their feisty spirit. When the province sent property-tax notices to Little Buffalo and threatened those who had built corrals and fences without provincial authority, the Lubicons trusted their own judgement and ignored Alberta's attempt at usurpation:

> Almost everybody at the settlement... cancelled the two-acre deeds, returned tax notices, fought the school proposal, and left the corrals standing, and, when provincial officials arrived to announce the dismantling of four houses deliberately built outside hamlet boundaries, Lubicon hunters strolled into the meeting with loaded rifles, a gesture that so far has kept the province from calling in the bulldozers.[4]

The province could have easily countered the Lubicon with an armed force with which the band would have had no chance to overcome. But the province retreated, perhaps knowing that an all-government attack would not be tolerated by Canadians, or maybe because officials privately admitted to themselves that the Lubicon had a case. The Lubicon, for their part, could only gain confidence in their struggle with such a show of unified determination. Other native groups heard of the incident, and nodded approvingly at the Lubicon display of strength. This same approach was used in October, 1988, when the Lubicon, frustrated by dealings with the provincial and federal government, set up blockades to stop oil trucks from entering their disputed territory. The government forcibly dismantled the blockade, but, for the first time, the provincial government agreed to the Lubicon's proposal for a reserve. A year later, the federal government had still not come through, so the band once again took the initiative. On 29 October 1989 the Lubicon gave Petro-Canada 30-day's notice for the crown corporation to obtain band permits and pay royalties for using the traditional lands, or else be evicted.[5] However observers might judge Bernard Ominayak's term as chief of the Lubicon, few will be able to criticize him for remaining still. As has been shwon, under Ominayak's direction, the Lubicon became more and more astute in reacting to changes in the political and legal game, and capitalized whenever possible in the struggle for public opinion and support. They have not been passive victims clinging to their "traditional" past, though they mourn the loss of a way of life that was abruptly ended in recent memory, and which has not been replaced by a viable alternative. Still, they have been and continue to be skillful and active participants in the process that was forced upon them, albeit often from an unequal position of strength and resources.

If violent clashes occur between the Lubicon and federal forces, the Lubicon and all their supporters will likely lose. On the other hand, the Lubicon feel that they have already lost a great deal, and it is doubtful whether anyone has won anything. If profits continue to come first before people, if development by some is more important than the way of life of others, who will ultimately win? Regardless of the outcome with the Lubicon struggle, the scars on the land and on the people's souls will not heal in a lifetime. Chief Ominayak wonders how long his people will withstand the pressures from without, and hopes that the community will stay intact, otherwise no one will make it. "That is one of the biggest fears I have, all the time - that even if we win, we've lost."[6] The same might be said of all the other sides in the land dispute. When it comes to using the fragile ecosystem, and sharing the natural resources in it, more and more people have concluded that everyone must "yield" or all will "perish."

ENDNOTES

[1] Daniel Raunet, Without Surrender, 19.

[2] Goddard, "Double-Crossing," 7-8.

[3] Ibid., 3.

[4] Ibid., 7.

[5] Don Thomas, "Lubicons threaten to evict Petro-Can," The Edmonton Journal, 2 November 1989.

[6] Sniatynski, "Lubicon disputes."

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